(24,812)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 529.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 2351

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES)

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

VOLUME I.
(Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

FILMER BROS. CO., PRINT, 330 JACKSON ST., S. F., CAL.

[Names and Addresses of Attorneys.]

F. M. DUDLEY, C. H. HANFORD, H. H. FIELD, Seattle, Washington,
Attorneys for Appellant.

C. H. LINGENFELTER, U. S. District Attorney, Boise, Idaho,

W. C. HENDERSON, Missoula, Montana,
Attorneys for Respondent.

Register Entries.

No. 403.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,
Defendant.

ATTORNEYS:

U. S. ATTORNEY, for Plaintiff.

CULLEN & DUDLEY, H. H. FIELD, C. H. HANFORD, for Defendants.

1909.

June 25. Filing complaint.

July 6. Filing and entering appearance of defendant.

July 29. Fil. stipulation extending time for defendant to plead, until Aug. 14, 1909.

Aug. 2. Fil. demurrer to complaint.

Aug. 2. Fil. exceptions to bill of complaint.

Aug. 12. Fil. stipulation, exceptions to complaint set for hearing 1st day of Oct. term at Moscow.

Oct. 28. Making record of argument on demurrer and motion to strike from complaint.

Oct. 28. Making record of submission of motion to strike from complaint.

Oct. 28. Fil. stipulation that articles of incorporation of defendant were filed Sept. 17, 1906.

Oct. 28. Making record of argument upon exceptions to bill of complaint.

Oct. 29. Ent. order submitting exceptions to bill of complaint.

Dec. 3. Fil. defendant's brief.

1910.

Feb. 12. Fil. opinion upon demurrer and exceptions to bill of complaint.

Feb. 15. Ent. order overruling demurrer and denying exceptions.

Mar. 9. Fil. and ent. order extending time for defendant to answer to rule day in April.

Apr. 4. Fil. answer.

Apr. 26. Fil. petition for leave to amend bill of complaint.

Apr. 26. Fil. and ent. order to amend bill of complaint by interlineations.

July 18. Fil. stipulation to amend answer by substituting pages 12 and 13.

July 19. Fil. replication.

Aug. 23. Fil. stipulation for appointment of J. B. Hogan, of Coeur d'Alene, Examiner.

1911.

Jan. 3. Fil. motion for leave to amend bill of complaint.

Jan. 3. Fil. notice of motion.

Jan. 3. Ent. order appointing J. B. Hogan, of Coeur d'Alene, Examiner.

Jan. 3. Ent. order of record.

Jan. 12. Fil. stipulation allowing plaintiff to amend complaint by interlineation.

Mar. 17. Fil. notice of taking testimony.

Apr. 1. Fil. praecipe for subpoena for Dorr Skeels and 5 others.

Apr. 1. Issuing subpoena for above witnesses.

Apr. 1. Fil. praecipe for subpoena for W. W. Morris and 4 others.

Apr. 1. Issuing subpoena for above witnesses.

Apr. 1. Fil. praecipe for subpoena for Daniel Seery.

Apr. 1. Issuing subpoena for above witness.

May 8. Fil. deposition of Dorr Skeels et al., taken by J. B. Hogan, Special Examiner.

May 9. Fil. complainant's stipulation to accompany transcript of testimony and exhibits.

June 1. Fil. deposition of F. I. Rockwell and others for complainant.

June 1. Fil. exhibit for plaintiff.

June 19. Fil. sub. for Dorr Skeels and others on return. Ent. return.

June 19. Fil. sub. for W. W. Morris and others on return. Ent. return.

June 19. Fil. sub. for Daniel Seery on return. Ent. return.

Sept. 6. Fil. stipulation. Defendant to Nov. 1, 1911, to take testimony of witnesses.

Sept. 23. Fil. stipulation. Defendant to take testimony of Geo. R. Peck, Oct. 1, 1911, at Chicago.

Oct. 9. Fil. deposition of George R. Peck.

Oct. 27. Fil. stipulation to submit cause upon briefs.

Dec. 15. Fil. deposition of Arthur E. Douglass and others taken at Spokane, Wash.

1912.

Mar. 1. Fil. stipulation to take deposition.

Apr. 10. Fil. deposition taken at Washington, D. C., for plaintiff.

Apr. 16. Fil. deposition of Wm. F. Cox.

Apr. 19. Fil. deposition of F. A. Silcox.

May 5. Fil. deposition of Dorr Skeels and others.

May 29. Fil. stipulation, plaintiff to July 1, 1912, to file brief.

June 26. Fil. stipulation correcting testimony.

July 1. Fil. plaintiff's brief.

Nov. 18. Fil. objections to admission of evidence.

Nov. 18. Ent. order submitting cause upon briefs. (Argument later at Boise.)

1913.

Jan. 7. Making record of argument.

Jan. 8. Making record of argument concluded.

Jan. 8. Fil. 8 exhibits for defendant.
Jan. 24. Fil. plaintiff's supplemental brief.
Apr. 1. Fil. opinion.
May 7. Fil. stipulation.
May 21. Fil. opinion.
June 11. Fil. decree.
June 11. Ent. decree of record.
June 11. Dockets and indexes—Issue joined—Testimony given.
June 11. Fil. judgment-roll.
June 19. Fil. cost bill.
Nov. 15. Statement of evidence to be included in record on appeal lodged in clerk's office for examination by complainant's solicitors.
Nov. 25. Ent. order entering C. H. Hanford as associate counsel for defendant.
Nov. 25. Fil. assignment of errors.
Nov. 25. Fil. praecipe for transcript.
Nov. 25. Fil. notice of appeal.
Nov. 25. Fil. order fixing amount of cost bond and allowing appeal.
Nov. 25. Fil. appeal bond.
Nov. 25. Fil. order to transmit original exhibits.
Nov. 25. Fil. citation returnable Dec. 22, 1913.
Nov. 26. Fil. statement of evidence on appeal after approval by the Judge.
Dec. 6. Fil. notice of application to file supersedeas bond.

Complaint.

(Caption.)

George W. Wickersham, Attorney General of the United States, brings this bill for and on behalf of the United States of America, plaintiffs herein, against the Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation, duly incorporated and existing under the laws of the State of Idaho a citizen of said State, and having a principal place of business at , Idaho.

And thereupon your orator complains and says that:

First. The defendant, the Chicago, Milwaukee & St. Paul Railway Company of Idaho, is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, and operating a railroad in and through the District of Idaho.

Second. On March 21, 1905, the Commissioner of the General Land Office for and on behalf of the Secretary of the Interior and the President of the United States did, by his order duly made and published on that date, in order to effectuate the will of Congress as expressed in the Act of March 3, 1891, (26 Stat. 1103,) and the Act of June 4, 1897 (30 Stat. 34 and 36,) temporarily withdraw from all sale and disposal, except under the mineral laws, and, pending a decision of the President as to the advisability of creating a National Forest thereof, did make reservation of a large body of the vacant unappropriated public lands of the plaintiffs situate, lying,

and being within the limits of the State and District of Idaho. [1*]

Third. On November 6, 1906, and while said order of withdrawal was in full force and effect, the President of the United States by his proclamation, duly made and issued on that date, did, by virtue of, and in accordance with, the authority conferred upon him by Section 24 of the Act of Congress, approved March 3, 1891, entitled "An Act to Repeal Timber Culture Laws and for other Purposes" (26 Stat. 1103), reserve from sale, entry, settlement, and other disposal, and set apart as a public reservation to be known as the Coeur d'Alene Forest Reserve, a large body of the public lands of the plaintiffs situate, lying, and being within the limits of the State and District of Idaho, and including, except for some minor omissions, not material here to be mentioned, the lands embraced in said temporary withdrawal of March 21, 1905, which bodies of land, by force of the said proclamation so authorized and so reserving the same, have ever since the date of such proclamation constituted and been, and now constitute and are, a part of the public forest reservation of the plaintiffs set aside for, and devoted to, the effectuation of their laws and policy touching the preservation and use of the National Forests.

For a full description of the bounds of the said lands temporarily withdrawn, and of the said reservation, should such become material to consider in the progress of this cause, your orator requests leave to refer to the said order of withdrawal and to the

*Page-number appearing at foot of page of original certified Record.

said proclamation respectively wherein the descriptions are fully set forth.

Fourth. On February 11, 1904, the Secretary of the Interior, in accordance with the discretionary authority conferred upon him by the Act of March 3, 1899 (30 Stat. 1233), entitled "An Act Making Appropriations to Supply Deficiencies in the Appropriations [2] for the Fiscal Year Ending June 30, 1899, and for Prior Years and for Other Purposes," and in order to prevent the approval of applications for rights of way in cases when, in his judgment, the public interests would be injuriously affected thereby, publicly promulgated (32 L. D. 481), certain regulations and conditions for the protection of public interests as being necessary prerequisites for the protection of such interests, to be complied with by persons and corporations filing maps in order to obtain rights of way for railroads over and across forest reservations and reservoir sites. Among these regulations and conditions are the following:

> 2. Whenever a right of way is located upon a forest or timber-land reserve the applicant must file a stipulation under seal incorporating the following:
>
> (1) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.
>
> (2) That the applicant will cut no timber from the reserve outside the right of way.
>
> (3) That the applicant will remove no timber within the right of way, except only such

as is rendered necessary by the proper use and enjoyment of the privilege for which application is made, and that he will also remove from the reservation, or destroy, under proper safeguards, as determined by this office, all standing, fallen and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be determined by the General Land Office to be essential to protect the forest from fire to the fullest extent possible.

(4) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business (Acting Secretary, September 2, 1902).

The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat. 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the

bond cannot be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been [3] considered by this office or the Department and permission for such construction has been specifically given. and on April 25, 1906, the Secretary of the Interior amended said conditions by a regulation, publicly promulgated (34 L. D. 583), as follows:

In accordance with the agreement made by and between the Department of the Interior and the Department of Agriculture, paragraph 2 of the Circular of February 11, 1904 (32 L. D. 481), and paragraph 3 and 66 of the circular of September 28, 1905 (34 L. D. 212), except the last clause in each relative to construction in advance of approval or specific permission, which will remain as at present, are hereby amended so as to read as follows:

Whenever a right of way is located upon a forest or timber-land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves.

This amendment applies to forest or timber-land reserves only, not to national parks.

Fifth. On October 23, 1906, and while said order

of withdrawal was in full force and effect the defendant filed in the United States Land Office at Coeur d'Alene, Idaho, a certain map, a copy of which, marked Exhibit "A," is hereto attached and is made a part of this complaint, purporting to represent and to be a profile and survey and plat of a proposed right of way for a railroad of the defendant through certain lands of the United States as follows, to wit:

Traversing lot one (1), the S./2 of the NE./4, the N./2 of the SE./4, the S./2 of the NW./4 and lot four (4) of Section 3, also lot one (1), lot two (2), the SW./4 of the NE./4, the SE./4 of the NW./4, lot three (3), and lot four (4) of Section 4; also lot one (1), the S./2 of the NE./4, the NW./4 of the SE./4, the SW./4, the SW./4 of the NW./4, lot four (4), and lot three (3) of Section 5, all in T. 46 N., R. 6 E., B. M.; also traversing the NE./4 of the SE./4 and the S./2 and the NE./4 of the NE./4 of Section 36, the S./2 of the SE./4 of Section 25, the W./2 of the NE./4, the S./2 of the NW./4 and the NW./4 of the

[4] NW./4 of Section 36, the SW./4 of the SW./4 of Section 25, the SE./4 of the SE./4 of Section 26, and the E./2 of the NE./4 of Section 35, all in T. 47 N., R. 5 E., B. M.; thence southeasterly and southerly on the southerly and westerly side of the North Fork of the St. Joseph River and following, generally, the course thereof, traversing the SW./4 of the NW./4 the NE./4 of the SW./4, the NW./4 of the SE./4, and the S./2 of the SE./4 of Section 36, in T. 47 N., R. 5 E., B. M., also traversing lot two (2), the S./2 of the NE./4, and the E./2 of the SE./4 of Section 6, and the E./2 of the NE./4, and the NE./4

of the SE./4 of Section 7, in T. 46 N., R. 6 E., B. M., to the W./2 of the SE./4 of said Section 7; thence along said river southwesterly crossing and recrossing the same to the west bank thereof in the said W./2 of the SE./4 of said Section 7, and crossing and recrossing said river to the west bank thereof in the SE./4 of the SW./4 of said Section 7, thence southwesterly traversing the NE./4 of the NW./4, and crossing and recrossing said river to the southwesterly bank thereof in lot one (1) of Section 18, T. 46 N., R. 6 E., B. M,; thence generally along said river altogether on the westerly side thereof traversing lot two (2) of said Section 18, T. 46 N., R. 6 E., B. M., and the SE./4 of the NE./4 and the E./2 of the SE./4 of Section 13, and the NE./4 of Section 24 to a point in the SE./4 of the NE./4 of said Section 24, T. 46 N., R. 5 E., B. M.; thence crossing said river to the easterly bank thereof in said SW./4 of the NE./4 of said Section 24, and traversing the W./2 of the SE./4 of said Section 24, and crossing said river to the westerly bank thereof in the SW./4 of the SE./4 of said Section 24; thence along said river, altogether on its westerly side, traversing the E./2 of the NW./4 and the W./2 of the NE./4 to the NE./4 of the SW./4 of Section 25; thence crossing and recrossing said river to its westerly bank in the said NE./4 of the SW./4 of said Section 25; thence altogether on the westerly side of said river to a point near the South line of said Section in the SW./4 of the SW./4 **[5]** thereof; thence crossing and recrossing said river in the NW./4 of the NW./4 and again in the SW./4 of the NW./4 of Section 36, all in T. 46 N., R. 5 E.,

B. M.; thence along said river altogether on its westerly side traversing the W./2 of the SW./4 of said Section 36, T. 46 N., R. 5 E., B. M., and the N./2 of the NW./4 and to the S./2 of the NW./4 of unsurveyed Section 1, T. 45 N., R. 5 E., B. M.; thence crossing and recrossing said river to a point on its westerly bank in the said S./2 of the NW./4 of said unsurveyed Section 1; thence following generally said river altogether on the westerly side thereof, trabersing the SW./4 of unsurveyed Section 1, the NW./4 of the NW./4 of unsurveyed Section 12 and the NE./4 of unsurveyed Section 11 to the E./2 of the NW./4 of unsurveyed Section 11, all in T. 45 N., R. 5 E., B. M.; thence crossing and recrossing said river to a point in the SE./4 of the NW./4 of unsurveyed Section 11; thence along said river altogether on its westerly side traversing the N./2 of the SW./4, and the SW./4 of the SW./4 of said unsurveyed Section 11, to the SE./4 of the SE./4 of unsurveyed Section 10, all in T. 45 N., R. 5 E., B. M.; thence crossing and recrossing said river to a point on its westerly bank in the said SE./4 of the SE./4 of unsurveyed Section 10; thence southerly, southwesterly and westerly along the St. Joseph River altogether on the westerly and northerly side thereof, traversing the north halves of unsurveyed Sections 15, 16, and 17; the NE./4 of the NE./4 of unsurveyed Section 18, and the S./2 of unsurveyed Section 7, all in T. 45 N., R. 5. E., B. M., and lot one (1) on the northerly side of said river of Section 12, T. 45 N., R. 4 E., B. M., all said lands being included in the lands reserved from entry and sale by said order of withdrawal of

March 21, 1905, and subsequently by said proclamation of November 6, 1906.

Sixth. On March 20, 1907, and long after the said lands had [6] been included in the said Coeur d'Alene National Forest, but while the said map filed on October 23, 1906, was still unapproved by the Secretary of the Interior, the defendant filed in the United States Land Office at Coeur d'Alene, Idaho, another or second map, purporting to be an amended map and to represent and be a profile and survey and plat of a proposed right of way for a railroad of the defendant through lands belonging to the plaintiffs as hereinafter in this paragraph described, which proposed right of way differs almost wholly from the proposed right of way as shown in said map filed October 23, 1906. Whereupon, in accordance with the usual practice and procedure of the General Land Office the said map filed October 23, 1906, was returned to the defendant without being approved by the Secretary of the Interior; the lands of plaintiffs crossed by said proposed right of way as shown by said map filed March 20, 1907, are as follows to wit:

Traversing the W./2 of unsurveyed Section 35, T. 47 N., R. 6 E., B. M., also lot four (4), the SW./4 of the NW./4, and the S./2 of Section 2, the SW./4 of Section 1, the E./2 of the NW./4, the S./2 of the NE./4, and the NE./4 of the SE./4 of Section 12 all in T. 46 N., R. 6 E., B. M., also the S./2 of unsurveyed Section 7; and the N./2 of the N./2 of unsurveyed Section 18, all in T. 46 N., R. 7 E., B.

M.; also the NE./4 of the NE./4 of Section 13; the S./2 of Section 12; also southwesterly and curving again and returning northeasterly across the SE./4 of Section 11; also following generally the trend of the East Fork of the North Fork of the St. Joseph River, altogether on the southerly side thereof, traversing the SE./4 of the NE./4, the N./2 of the NE./4, the E./2 of the NW./4, and the N/2 of the SW./4 of Section 11; the NE./4 of the SE./4, the SE./4 of the NE./4, the S./2 of the NE./4, and the NE./4 of the NW./4 of Section 10; the S./2 of the SW./4 of Section 3; the S./2 of the S./2 of Section 4; the S./2 of the SE./4 of Section 5; the NW./4 of the NE./4 and the N./2 of the NW./4 [7] of Section 8, crossing the East Fork of the North Fork of the St. Joseph River in the NW./4 of the NW./4 of said Section 8, thence westerly and crossing the North Fork of the St. Joseph River to a point on the westerly side thereof in the NE./4 of the NE./4 of Section 7, thence westerly and southwesterly altogether on the northerly and westerly side of said river traversing the E./2 of the NE./4, and the NE./4 of the SE./4 of said Section 7, to the W./2 of the SE./4 of said Section 7, thence crossing and recrossing said river to a point on the westerly side of said river in said W./2 of the SE./4 of said Section 7, thence on the northerly and westerly side of said river to a point in the SE./4 of the SW./4 of said Section 7, thence crossing and recrossing said river to a point on the westerly side of said river in lot four (4) of said Section 7; thence crossing and re-

crossing said river in lots one (1) and two (2) of Section 18 to a point on the westerly side of said river in said lot two (2) of said Section 18, all in T. 46 N., R. 6 E., B. M., thence southwesterly altogether on the northwesterly side of said river traversing the SE./4 of the NE./4 of Section 13, T. 46 N., R. 5 E., B. M., to the NE./4 of the SE/4 of said Section 13, thence crossing and recrossing said river to a point on the southwesterly side thereof in the NE./4 of the SE./4 of said Section 13, thence southwesterly altogether on the northwesterly side of said river traversing the S./2 of the SE./4 of said Section 13, to a point in the NW./4 of the NE./4 of Section 24, thence crossing said river and recrossing the same to a point on the southwesterly side thereof in the SW./4 of the NE./4 of said Section 24, thence southwesterly along said river altogether on the westerly side thereof, traversing the NW./4 of the SE./4, and the E./2 of the SW./4 of said Section 24 and the E./2 of the NW./4 of Section 25 to a point in the N./2 of the SW./4 of Section 25, thence southwesterly crossing and recrossing said river in said N./2 of the SW./4 of said Section [8] 25, and again crossing and recrossing said river to a point on the westerly side thereof in the SW./4 of the SW./4 of said Section 25, thence southerly along said river altogether on the westerly side thereof, traversing the SE./4 of the SE./4 of Section 26, the NE./4 of the NE./4 of Section 35, and the W./2 of the W./2 of Section 36, all in T. 46 N., R. 5 E., B. M., thence southerly along said river altogether on the westerly and north-

erly side thereof, traversing the W./2 of the W./2 of unsurveyed Section 1; the NW./4 of the NW./4 of unsurveyed Section 12, the N./2 of the NE./4 of unsurveyed Section 11, to a point in the E./2 of the NW./4 of unsurveyed Section 11, thence crossing and recrossing said river to a point on the westerly side thereof in the E./2 of the NW./4 of said unsurveyed Section 11, thence southwesterly along said river altogether on the northwesterly side thereof, traversing the W./2 of the SW./4 of said unsurveyed Section 11, to a point in the SE./4 of the SE./4 of unsurveyed Section 10, thence crossing and recrossing said river to a point on the westerly side thereof in the said SE./4 of the SE./4 of said unsurveyed Section 10, thence southerly, southwesterly, and westerly along the St. Joseph River and altogether on the westerly and northerly side thereof, traversing the north halves of unsurveyed Sections 15, 16, and 17, the NE./4 of the NE./4 of unsurveyed Section 18; and the S./2 of unsurveyed Section 7, all in T. 45 N., R. 5 E., B. M., lot one (1), lot two (2), lots three (3) and six (6), and lots four (4) and five (5) of Section 12 and extending along the northerly side of said river to the westward of said Section 12, all in T. 45 N., R. 4 E., B. M., all of said lands being included in the lands reserved from disposal and sale by said order of withdrawal of March 21, 1905, and by said proclamation of November 6, 1906. [9]

Seventh. On May 10, 1907, and long after the said lands had been included in the said Coeur d'Alene National Forest, but while the said map

filed on March 20, 1907, was still unapproved by the Secretary of the Interior, the defendant filed in the United States Land Office at Coeur d'Alene, Idaho, another or third map, a copy of which marked Exhibit "B," is hereto attached and made a part of this complaint, purporting to be an amended map or second amended map and to represent and be a profile and plat of a proposed right of way for a railroad of the defendant through lands belonging to the plaintiffs as hereinafter in this paragraph described, which proposed right of way differs materially from both of the proposed rights of way as shown on the said maps filed October 23, 1906, and March 20, 1907. Whereupon, in accordance with the usual practice and procedure of the General Land Office the said map, filed March 20, 1907, was returned to the defendant without being approved by the Secretary of the Interior; the lands of plaintiffs crossed by said proposed right of way as shown by said map, filed May 10, 1907, are as follows, to wit:

Traversing the W./2 of unsurveyed Section 35, T. 47 N., R. 6 E., B. M., also lot four (4), the SW./4 of the NW./4, and the S./2 of Section 2, the SW./4 of Section 1, the E./2 of the NW./4 and the S./2 of the NE./4 and the NE./4 of the SE./4 of Section 12, all in T. 46 N., R. 6 E., B. M., also the S./2 of unsurveyed Section 7, and the N./2 of unsurveyed Section 18, all in T. 46 N., R. 7 E., B. M., also following generally the trend of the East Fork of the North Fork of the St. Joseph River, altogether on the southerly side thereof, traversing the NE./4 of the NE./4

of Section 13; the S./2 of Section 12, the [10] SE./4 of the NE./4, the W./2 of the NE./4, the SE./4 of the NW./4 and the N./2 of the SW./4 of Section 11; the N./2 of the SE./4, the W./2 of the NE./4 and the NE./4 of the NW./4 of Section 10; the S./2 of the SW./4 of Section 3; the S./2 of the S./2 of Section 4; the S./2 of the SE./4 of Section 5; and the NW./4 of the NE./4 and the N./2 of the NW./4 of Section 8; thence following generally the trend of the North Fork of the St. Joseph River altogether on the easterly side thereof, traversing the S./2 of the NE./4, the NE./4 of the SE./4, and the W./2 of the SE./4 of Section 7, and the NE./4 of the NW./4, lot one (1), lot two (2), lot three (3), and lot four (4) of Section 18, all in T. 46 N., R. 6 E., B. M., the SE./4 of the SE./4 of Section 13, the E./2 of the NE./4, the NE./4 of the SE/4, and the W./2 of the SE./4 of Section 24, the W./2 of the NE./4, the E./2 of the NW./4, the NW./4 of the SE./4, and the N./2 of the SW./4 of Section 25, thence crossing said river to a point on the westerly side thereof near the center of the SW./4 of Section 25, thence southerly and westerly following generally the trend of said river altogether on the westerly and northerly side thereof, traversing the SW./4 of the SW./4 of Section 25, the NE./4 of the NE./4 of Section 35, and the W./2 of the W./2 of Section 36, all in T. 46 N., R. 5 E., B. M., the W./2 of the W./2 of unsurveyed Section 1; the NW./4 of the NW./4 of unsurveyed Section 12, the NE./4 and the E./2 of the NW./4 of unsurveyed Sec-

tion 11, to a point in the SE./4 of the NW./4 of unsurveyed Section 11, thence crossing and recrossing said river to a point on the westerly side thereof in the N./2 of the SW./4 of said unsurveyed Section 11, thence southwesterly along said river altogether on the northwesterly side thereof, traversing the W./2 of the SW./4 of said unsurveyed Section 11, to a point in the SE./4 of the SE./4 of unsurveyed Section 10, thence crossing and recrossing said river to a point on the westerly side thereof in the said SE./4 of the SE./4 of said unsurveyed [11] Section 10, thence southerly, southwesterly, and westerly along the St. Joseph River and altogether on the northerly side thereof, traversing the north halves of unsurveyed Sections 15, 16, and 17; the NE./4 of the NE./4 of unsurveyed Section 18; and the S./2 of unsurveyed Section 7, all in T. 45 N., R. 5 E., B. M., lot one (1), lot two (2), lots three (3) and six (6), and lots four and five (5) of Section 12 and extending along the northerly side of said River to the westward of said Section 12, all in T. 45 N., R. 4 E., B. M. All of said lands being included in the lands reserved from disposal and sale by said order of withdrawal of March 21, 1905, and by said proclamation of November 6, 1906. Said map, filed May 10, 1907, has never been approved by the Secretary of the Interior for the reason that the defendant has neglected and refused to execute and file, or execute or file, the stipulation and bond prescribed and required as hereinafter set forth.

Eighth. On May 10, 1907, the defendant, desiring

immediate permission from the forester of plaintiffs' Forest Service to begin construction of its railroad in the said Coeur d'Alene National Forest, Idaho, in advance of the approval by the Secretary of the Interior of its said map filed May 10, 1907, promised and agreed by an instrument in writing signed by George R. Peck, its general counsel, and approved by James B. Adams, Acting Forester, a copy of which, marked Exhibit "C," is hereto attached and made a part of this complaint, to execute and abide by stipulation and conditions to be prescribed by the Forester in respect to said railroad, such stipulations and conditions to be as nearly as practicable like certain stipulations executed by the Chicago, Milwaukee & St. Paul Railway Company of Montana, on January 18, 1907, in [12] respect to its railroad within the Helena National Forest, Montana, a copy of which, marked Exhibit "D," is hereto attached and made a part of this complaint. And thereupon, to wit: On May 10, 1907, the Forester in reliance upon and in execution of the terms of said agreement, by telegram, a copy of which, marked Exhibit "E," is hereto attached and made a part of this complaint informed Richard H. Rutledge, Forest Supervisor of said Coeur d'Alene National Forest, that advance permission had been given defendant to construct its railroad through said Coeur d'Alene National Forest, and directed said Richard H. Rutledge, Forest Supervisor as aforesaid, to supervise the clearing and piling of brush, and scale all timber cut, which instructions were, on May 11, 1907, confirmed by the Forester in a letter to said Richard H. Rutledge, a

copy of which, marked Exhibit "F," is hereto attached and made a part of this complaint; and thereupon to wit, immediately after the execution of said agreement of May 10, 1907, and the said giving of permission for advance construction thereunder, and continuously thereafter until December 3, 1907, and the defendant availed itself of all the advantages, benefits, and privileges given and conferred by said agreement and affirmed the same, and by virtue thereof was by the forester permitted to and did in advance of such approval or any approval of any map of its said railroad, begin and carry on the actual construction of its said railroad in the said Coeur d'Alene National Forest. And on December 3, 1907, after defendant had ratified and affirmed said agreement and had long been engaged in performing the acts set forth in the tenth paragraph of this complaint, said George R. Peck, general counsel for the defendant, verbally informed the forester of defendant's claim that it ought not to be required to file any stipulations whatever. [13]

Ninth. Heretofore, and prior to the institution of this suit, the Secretary of Agriculture prescribed a stipulation, a copy of which, marked Exhibit "G," is hereto attached and made a part of this complaint, reasonable in all its conditions, terms, and provisions, necessary for the protection of the Coeur d'Alene National Forest and of the public interests to be affected by said proposed right of way, and as nearly as practicable like the said stipulations executed by the defendant on January 18, 1907, in respect to its

railroad within the Helena National Forest, referred to in the eighth paragraph of this complaint, and through the duly authorized officers and agents of plaintiffs' Forest Service notified the defendant that he, the Secretary of Agriculture, had prescribed such stipulation and required the defendant to enter into and execute the same for the protection of the Coeur d'Alene National Forest and of the public interests to be affected by the said proposed right of way; and likewise heretofore on August 14, 1908, and prior to the institution of this suit the Secretary of the Interior, required that the defendant should comply with said requirements of the Secretary of Agriculture as a condition precedent to approval by the Secretary of the Interior of the defendant's said map filed May 10, 1907, and likewise, heretofore, on October 10, 1908, the Secretary of the Interior determined and decided that the public interests will be injuriously affected unless the stipulation in question is executed and filed by the defendant, and on said date and prior to the institution of this suit, the Secretary of the Interior notified the defendant that unless said stipulation should be duly executed and filed within fifteen days from October 10, 1908, said map filed May 10, 1907, would be rejected and striken from the files of the Department of the Interior, but the defendant has [14] neglected and refused and continues to neglect and refuse to enter into or execute any such stipulation, or to pay the plaintiffs, their officers or agents for the timber it has cut and is cutting upon the lands of plaintiffs. And likewise, heretofore, and on October 29, 1908,

and prior to the institution of this suit, said map, by order of the Secretary of the Interior, was rejected and stricken from the files of the Department of the Interior, and returned to the defendant without being approved by the Secretary of the Interior. And no map, profile, survey, or plat of said proposed railroad of the defendant other than as hereinbefore mentioned has ever been either filed or approved by the Secretary of the Interior.

Tenth. Since a long time anterior to the filing of said second or third or so-called amended maps or either thereof, and at all times since the said proclamation of November 6, 1906, the defendant without any authority from the plaintiffs except under the terms and conditions of the said agreement mentioned in the Eighth paragraph hereof, and in violation of the law of the United States and without complying or making any attempt to comply in any way whatsoever with the said regulations or conditions prescribed by the Secretary of the Interior and particularly without entering into the stipulation which has been prescribed and required by the Secretary of Agriculture and the Secretary of the Interior as aforesaid for the protection of the said National Forest and of the public interests to be affected by the said proposed right of way, although repeatedly requested so to do, and without any permission of any kind whatsoever from the plaintiffs' their officers or agents, except under the terms and conditions of the said agreement mentioned in the Eighth paragraph hereof, and in violation of the said agreement, and without any payment whatever there-

for to plaintiffs or plaintiffs' officers or [15] agents, has cut and caused to be cut a large amount of timber, to wit:

Eight million nine hundred and ninety-six thousand, five hundred and thirty (8,996,530) feet, board measure, upon said lands of the plaintiffs, upon a strip one hundred (100) feet wide on each side of the center line of said pretended right of way and an additional strip one hundred (100) feet wide on the more elevated or uphill side of said strip, and in some instances upon land adjacent to said strips, and specifically upon the following legal subdivisions, and in the following amounts, to wit:

Township 45 N., R. 4 E., Boise Meridian.

Section 12:	SE./4 SE./4	25500
	SW./4 SW./4	25000
	SW./4 SE./4	25950
	SE./4 SW./4	25500

Approximately unsurveyed:

Township 45 N., R. 5 E., Boise Meridian.

Unsurveyed Section 1:	NW./4 NW./4	7101
	SW./4 NW./4	6593
	NW./4 SW./4	6082
	SW./4 SW./4	8119
Unsurveyed Section 7:	NE./4 SE./4	50000
	NW./4 SE./4	55000
	SE./4 SE./4	54000
	NE./4 SW./4	5000
	SW./4 SW./4	50000
	SE./4 SW./4	50650
Unsurveyed Section 10:	SE./4 SE./4	11614

Unsurveyed Section 11:	NE./4 NE./4	11604
	NW./4 NE./4	11604
	NW./4 SW./4	11604
	NE./4 NW./4	5801
	SE./4 NW./4	11604
	NE./4 SW./4	5801
Unsurveyed Section 12:	NW./4 NW./4	8797
Unsurveyed Section 15:	N./2 N./2	250000
Unsurveyed Section 16:	N./2 NW./4	200000
Unsurveyed Section 17:	NE./4 NE./4	70230
	SE./4 NW./4	75000
	NW./4 NW./4	9000

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	NW./4 NE./4	20000
	SW./4 NE./4	60000
	SW./4 NW./4	70000
Unsurveyed Section 18:	NW./4 NE./4	34580

Township 46 N., R. 6 E., Boise Meridian.

Unsurveyed Section 25:	NW./4 NE./4	3426
	NE./4 NW./4	3426
	SW./4 NE./4	6513
	NW./4 SE./4	3426
	NE./4 SW./4	7346
	NW./4 SW./4	487
	SW./4 SW./4	8321
Section 35:	NE./4 NE./4	12850
Unsurveyed Section 36:	NW./4 NW./4	6300
	SW./4 NW./4	30000

Township 46 N., R. 6 E., Boise Meridian.

Section 1:	NE./4 SW./4	6400
	NW./4 SW./4	8000
	SE./4 SW./4	138850

Section 2:	NW./4 NW./4	225600
	SW./4 NW./4	94750
	NW./4 SE./4	8500
	NW./4 SW./4	35100
	NE./4 SW./4	9000
	SE./2 SW./4	3800
	SW./4 SE./4	6000
	NE./4 SE./4	11300
Section 3:	SW./4 SW./4	24510
Section 4:	SE./4 SE./4	16170
	SW./4 SE./4	87000
	SE./4 SW./4	239100
	SW./4 SW./4	227000
Section 5:	SE./4 SE./4	192950
Section 7:	SE./4 NE./4	46500
	NE./4 SE./4	1600
	NW./4 SE./4	600
	SW./4 SE./4	1500
Section 8:	NW./4 NE./4	192950
	NE./4 NE./4	22700
	NE./4 NW./4	227000
	SW./4 NW./4	45400
	NW./4 NW./4	179100
Section 9:	NE./4 NE./4	278970
Section 10:	NW./4 NW./4	61260
	NE./4 SE./4	341500
	NW./4 SE./4	34150
	SW./4 NE./4	375650
	NW./4 NE./4	85450
	NE./4 NW./4	227950

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Section 11:	NE./4 SE./4	40090
	SE./4 NE./4	197000
	NE./4 NE./4	27600
	NW./4 NE./4	94000
	SW./4 NE./4	81200
	SE./4 NW./4	75180
	NE./4 SW/4	100240
	NW./4 SW./4	125300
Section 12:	SW./4 NE./4	289890
	SE./4 SE./4	107100
	SW./4 SE./4	42840
	NE./4 NW./4	60136
	SE./4 NW./4	94435
	SW./4 NW./4	21420
	SE./4 NE./4	34340
	NE./4 SE./4	235260
	NW./4 SE./4	132855
	NE./4 SW./4	96390
	NW./4 SW./4	74970
Section 13:	NE./4 NE./4	23080

Approximately unsurveyed:

Township 46 N., R. 7 E., Boise Meridian.

Section 7:	NW./4 SW./4	63000
	SW./4 SW./4	195500
	SE./4 SW./4.	9500
	SE./4 SE./4	15000
Unsurveyed Section 18:	NE./4 NE./4	10000
	NW./4 NE./4	87015
	NE./4 NW./4	75100
	NW./4 NW./4	205500

Township 47 N., R. 6 E., Boise Meridian.

Section 26:	SW./4 SE./4	27800
	SE./4 SE./4	13900

Approximately unsurveyed:

Section 35:	NE./4 NW./4	282600
	NW./4 NW./4	149960
	SW./4 NW./4	439000
	NW./4 SW./4	460000
	SW./4 SW./4	202300
	NW./4 NE./4	6890

and has cleared and caused to be cleared a large portion thereof and is clearing and causing to be cleared other portions for the purpose of constructing a railroad and has constructed and caused to be constructed, and is constructing and causing to be constructed a railroad, and has so conducted and is so conducting its operations that it has destroyed **[18]** and caused to be destroyed and is destroying and causing to be destroyed large amounts of small timber and young growth upon the land heretofore described in this paragraph through unskilled methods of lumbering, and has thrown, rolled and deposited and is throwing, rolling and depositing great quantities of rock, earth, gravel and debris in the Saint Joseph River in divers places and adjacent to said pretended right of way whereby said Saint Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log driving, and will continue to be unfit and useless for purposes of navigation and log driving until said rock, earth, gravel and debris is removed therefrom, and through lack of proper precaution

against fire has set and caused to be set numerous fires along, upon and adjacent to said pretended right of way, and has thereby burned and destroyed and caused to be burned and destroyed a large amount of timber, young growth and seedlings, to wit: Four million forty-five thousand seven hundred (4,045,700) feet, board measure of merchantable timber, and one thousand three hundred forty-five and one-half (1,344½) acres of seedlings upon lands of the plaintiffs' specifically described as follows:

Approximately unsurveyed:

Township 46 N., R. 7 E., Boise Meridian.

Section 5:	SW./4 SW./4	110,000 ft.	25 acres
Section 6:	SE./4 SE./4	200,000	30
	SW./4 SE./4	100,000	25
Section 7:	NE./4 NE./4	380,000	40
	NW./4 NE./4	400,000	30
	SE./4 NE./ 4	50,000	40
	SW./4 NE./4	193,000	40
	NE./4 NW./4	106,000	25
	SE./4 NW./4	33,000	40
	SW./4 NW./4	40,000	16
	NE./4 SW./4	104,300	40
	NW./4 SW./4	85,000	20
	SE./4 SW./4	23,800	30
	SW./4 SW./4	10,000	20
	NE./4 SE./4	5,000	40
	NW./4 SE./4	30,000	40
	SE./4 SE./4	29,500	40

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	SW./4 SE./4	30,000	40

Section 8:	SW./4 SW./4	40,000	25
	SE./4 SW./4	101,400	20
	NW./4 SW./4	81,900	20
	NE./4 SW./4	13,000	35
	SE./4 NW./4	123,200	20
	NW./4 NW./4	505,000	38
	SW./4 SE./4	77,000	7
	NW./4 SE./4	22,000	20
	NE./4 SE./4	75,200	20
	SE./4 NE./4	22,800	30
	NE./4 NE./4		8
Section 9:	SW./4 NW./4	3,500	40
	SE./4 NW./4	42,500	40
	S./2 N./2 NW./4		46
Section 18:	NE./4 NW./4	60,000	25
	NW./4 NE./4	87,600	20
	NE./4 NE./4	62,000	20
	NW./4 NW./4		10
Township 46 N., R. 6 E., Boise Meridian.			
Section 2:	NW./4	161,000	6½
Section 4:	SE./4 SE./4		5
	SW./4 SE./4		6
	SE./4 SW./4	15,000	2
	SW./4 SW./4	75,000	10
Section 5:	SE./4 SE./4		1
Section 7:	SE./4 NE./4		5
	NE./4 SE./4		15
	SW./4 SE./4		3
Section 8:	NW./4 NE./4	20,000	6
	NE./4 NW./4	35,000	40
	NW./4 NW./4	35,000	27
	SW./4 NW./4	40,000	40

Section 10:	NE./4 SE./4	30,000	5
	NE./4 SE./4	30,000	5
	SW./4 NE./4	15,000	4
	NE./4 NW./4	15,000	10
Section 11:	SE./4 NE./4	30,000	10
	NE./4 NE./4		7
	SW./4 NE./4	31,000	6
	SE./4 NW./4	15,000	5
	NE./4 SW./4	40,000	3
	NW./4 S.W./4	45,000	8
Section 12:	SE./4 SE./4		4
Section 13:	NE./4 NE./4	72,000	30
Township 46 N., R. 5 E., Boise Meridian.			
Section 25:	S./2 SW./4	105,000	60
Township 47 N., R. 6 E., Boise Meridian.			**[20]**
Section 35:	SW./4	20,000	1

and is setting and causing to be set other fires along, upon and adjacent to said pretended right of way and is burning and destroying and causing to be burned and destroyed great quantities of timber, young growth and seedlings to the further damage of the plaintiffs.

Eleventh. Anterior to and during the commission of all the acts of the defendants in this bill of complaint averred the defendant was repeatedly warned by the duly authorized officers and agents of the plaintiff's Forest Service to cease and refrain from cutting timber and committing any other unauthorized acts of trespass or waste upon said National Forest or upon said proposed right of way, and from doing any construction work upon said proposed right of way and from operating a railroad thereon,

until the said stipulation prescribed and required by the Secretary of the Interior and the Secretary of Agriculture had been executed and filed in the General Land Office and until said map of definite location of said railroad and right of way had been approved by the Secretary of the Interior, but notwithstanding such [illegible]ng and in defiance of the same the defendant did wrongfully and unlawfully fail and refuse either to execute or file the said stipulation prescribed and required by the Secretary of the Interior and the Secretary of Agriculture or to cease from the cutting and destruction of said timber or from committing other acts of trespass and waste, but persisted knowingly so to trespass and commit waste and is now so trespassing and committing waste upon the said National Forest without having any license, permit, or consent or any other authority from or under the plaintiffs and in utter disregard of their rights and laws. **[21]**

Twelfth. The defendant, through its officers and agents, openly threatens, and it is its intention and purpose, to continue to disregard the said requirements of the Secretary of the Interior and of the Secretary of Agriculture, and without executing or filing any such stipulation required as hereinbefore set forth with the Secretary of the Interior or with the Secretary of Agriculture and without awaiting the approval of its said map or so-called amended map of definite location, and without any other permit or license or grant from or under the authority of the plaintiffs, to cut the plaintiffs' timber from their lands so reserved and withdrawn from sale and

disposal, and commit said other unauthorized acts of trespass and waste thereon and continue to construct and operate said railroad thereover in defiance of the laws and official requirements thereunder and contrary to the policy of the plaintiffs concerning the preservation, use, and management of the said reservation, and your orator avers that, unless restrained therefrom by the injunctive process of this Honorable Court, the defendant will carry out its threats and intentions and repeat from day to day, and from year to year, the wrongs and injuries to the plaintiffs hereinbefore described, to the permanent and irreparable damage and injury of the plaintiffs and of the public interests to be affected by the said proposed railroad and of the said reservation, and of the objects and purposes for which it was created.

Your orator avers that the aforesaid wrongful conduct of the defendant and the wrongful course which it threatens and intends to pursue as aforesaid involves and will continue to involve, long continuing and damaging trespasses for the redress and prevention whereof no adequate remedy exists at law, and constitute and are a public nuisance, injurious and unjust to the plaintiffs and to the great damage of and danger to their many citizens who live in the proximity of the lands so [22] trespassed upon.

IN CONSIDERATION WHEREOF, and forasmuch as the plaintiffs are without adequate remedy in the premises save in a court of equity, your orator prays that the said defendant, Chicago, Milwaukee

and St. Paul Railway Company of Idaho, may make full, true, and direct answer to all and singular the matters and things hereinbefore set out, as fully as if it had been particularly interrogated thereunto, but not under oath, an answer under oath being hereby expressly waived; that the defendant, The Chicago, Milwaukee and St. Paul Railway Company of Idaho, be commanded, ordered, and decreed to execute the stipulation prescribed and required by the Secretary of Agriculture and the Secretary of the Interior hereinbefore referred to and hereto attached and marked Exhibit "G"; and to cease and refrain from obstructing or continuing to obstruct the navigability of the Saint Joseph River; and that the defendant, Chicago, Milwaukee and St. Paul Railway Company of Idaho, and all and singular its servants, agents, representatives, and employees may be enjoined, ordered, adjudged, and decreed absolutely and unconditionally to cease and refrain from continuing or repeating in whole or in part the aforesaid wrongs and injuries, and from cutting, or causing to be cut any timber and from constructing or operating said or any railroad or any part or portion of any railroad within the bounds of the said Coeur d'Alene National Forest until it shall have executed and filed with the Secretary of the Interior the said required stipulation and until it shall have complied with the laws of the plaintiffs, and its said so-called amended map shall have been approved by the Secretary of the Interior; or that the defendant, The Chicago, Milwaukee and St. Paul Railway Company of Idaho and

all and singular its servants, agents, representatives, and employees may be [23] enjoined, ordered, adjudged, and decreed absolutely and perpetually to cease and refrain from continuing or repeating in whole, or in part, the aforesaid wrongs and injuries and from cutting or causing to be cut any timber, and from constructing or operating said or any railroad or any part or portion of any railroad within the bounds of the said Coeur d'Alene National Forest; and further that the plaintiffs may be accorded their damages and may have such other and further relief in the premises as to your Honors may seem just and equitable, together with their reasonable costs, etc.

May it please your Honors to grant unto the plaintiffs a writ of subpoena to be directed to the said Chicago, Milwaukee and St. Paul Railway Company of Idaho thereby commanding it at a certain time and under a certain penalty, therein to be limited, to appear before this Honorable Court and then and there full, true, and direct answer make to all and singular the premises, and to stand upon and abide by such order, direction, and decree as may be made in the premises that shall seem meet and agreeable to equity.

And your orators will ever pray.

GEORGE W. WICKERSHAM,
Attorney General of the United States,
C. H. LINGENFELTER,
United States Attorney for the District of Idaho,
Counsel and Solicitors for the Complainant. [24]

Exhibit "C" [to Complaint—Application and Permit to Begin Construction of Railroad].

UNITED STATES DEPARTMENT OF AGRICULTURE.

FOREST SERVICE.

Chicago, Milwaukee and St. Paul Railway Company of Idaho—Railroad (Interior)—Coeur d'Alene National Forest, Idaho.

WHEREAS, The Chicago, Milwaukee and St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the Company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana.

Date, May 10, 1907.

(Signed) GEO. R. PECK,

General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho.

Approved and advance permission given to construct, subject to ratification hereof by the Company.

Date, May 10, 1907.

(Signed) JAMES B. ADAMS,

Acting Forester. **[25]**

Exhibit "D" [to Complaint—Stipulation].

UNITED STATES DEPARTMENT OF AGRICULTURE.

FOREST SERVICE.

Chicago, Milwaukee & St. Paul Railway Company of Montana—Application for Right of Way—Helena Forest Reserve.

WHEREAS, a part of the proposed railroad right of way of the Chicago, Milwaukee & St. Paul Railway Company of Montana (hereinafter designated as "the Company"), as shown by a certain map of location filed by the Company in the Department of the Interior on August 23, 1906, under the Acts of March 3, 1875, and March 3, 1899 (said right of way being two hundred (200) feet in width), will be located within the Helena Forest Reserve, Montana, and

WHEREAS, by an amendatory regulation of the United States Department of the Interior, approved by the Secretary of the Interior on April 25, 1906, concerning rights of way for railroads, canals, reservoirs, etc., it is provided that:

> "Whenever a right of way is located upon a forest or timber-land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves," and

WHEREAS, the Secretary of Agriculture requires, for the protection of said Helena Forest Reserve, that the Company shall enter into the stipula-

tion hereinafter set forth, and

WHEREAS, the Secretary of Agriculture, in order to protect the said forest reserve from fire, requires the Company to clear and keep clear a strip of land one hundred and fifty (150) feet wide on each side of its right of way, except as [26] hereinafter provided, and permits the Company to use or sell the timber on said right of way and additional strips, upon payment as provided in Clause 2 hereof;

NOW, THEREFORE, the Company, in consideration of the premises, does hereby stipulate, agree and bind itself, its successors and assigns, as follows, to wit:

CLAUSE 1. To clear and keep clear of all timber and other inflammable substance, all said right of way and all other land controlled by the Company as a right of way however acquired between the points where the center line of said railway intersects the exterior boundary lines of said reserve, and all land of said forest reserve lying within two hundred and fifty (250) feet of said center line and being contiguous to said right of way; except such land as the Forester may specifically exclude in writing from the operation of this clause, as for example when a stream, the right of way of another company, or other adequate fire-break lies between the right of way of the Company and the said forest reserve; to dispose of all brush and other refuse in such clearing as required by the forest officer in charge; to cut all trees, when physically possible, so that they fall entirely within the strip to be cleared under this clause; and so far as is practicable to pile no timber or wood less

than one hundred (100) feet from the edge of the forest reserve.

CLAUSE 2. To pay, to the Special Fiscal Agent, Forest Service, Washington, D. C., when requested by the Forester, for timber and wood, within said right of way and the additional strips referred to in Clause 1 hereof, which at the time of cutting belongs to the United States, such lump sum as may be mutually agreed upon, or at the rate of one dollar ($1) per cord for wood, and three dollars ($3) per thousand feet board measure for usable or merchantable timber as scaled by the [27] Scribner rule Decimal C, by the Forest officer in charge, and in case of dispute the decision of the Forester shall be final, except that in lieu of the payments provided above the Company may pile separately in compact piles and with all limbs lopped off, and leave for disposal by the Forest Service, any timber or wood which the Company does not wish to use or sell; to transport such timber and wood, if sold by the Forester, at the established freight rates; and to put in a side track sufficient to handle timber and wood sold from said forest reserve.

CLAUSE 3. To construct and maintain in good and passable condition across said right of way, free of any charge or expense to the United States, crossing for all such now existing roads and trails intersected by the Company's railroad within said forest reserve as may be mutually agreed upon as necessary and practicable.

CLAUSE 4. The Company and all contractors and others employed by the Company, shall observe

such reasonable precautions against fire as the Forester may prescribe (but this shall not be construed as authorizing the Forester to require the company to use oil as fuel in its locomotives), and shall at all times exercise the utmost care to prevent fires, and shall promptly and without charge give all reasonably possible assistance in men and material, under the direction of the forest officer in charge, to fight fire within said reserve adjacent to said right of way.

CLAUSE 5. To pay the United States, through the Special Fiscal Agent, Forest Service, for any and all damages caused by fires, or otherwise sustained by the United States by reason of the use and occupation of said forest reserve by the Company, its successors and assigns; and it is agreed by the parties hereto that if any damage shall occur to the forest reserve lands by [28] fires started by the Company on other land, the liability of the Company *got* such damages shall be determined by the laws of the State of Montana or the United States, if applicable thereto.

CLAUSE 6. To make any assignment or transfer of its right of way through said reserve expressly subject to the fulfillment of all the conditions herein contained by the assignee or transferee.

IN WITNESS WHEREOF said corporation has caused these presents to be executed, and its corporate seal to be hereto affixed, at its office in Milwaukee, Wis., on this Eighteenth day of January,

1907, by its President and Agent hereto duly authorized.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF MONTANA.

By E. D. SEWALL,
President.

[Seal] Attest: E. W. ADAMS,
Assistant Secretary.

Approved January 24, 1907.

OVERTON W. PRICE,
Associate Forester. [29]

Exhibit "E" [to Complaint—Telegram].

(Copy.)

TELEGRAM.

Western Union.

Washington, D. C., May 10, 1907.

Rutledge,

Wallace, Idaho.

Advance permission given to-day St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows.

(Signed) POLLOCK. [30]

Exhibit "F" [to Complaint—Letter, Dated May 11, 1907 —G. F. Pollock to R. H. Rutledge].

(Copy.)

May 11, 1907.

Chicago, Milwaukee & St. Paul Railway Company of Idaho—Railroad—(Interior)—3/20/07— Coeur d'Alene National Forest, Idaho.

Mr. Richard H. Rutledge,
Wallace, Idaho.

Dear Sir:—

The following telegram in this case was sent to you to-day:

> "Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows."

a blue print showing the route has been sent to you under separate cover. Enclosed with this letter is a copy of the preliminary stipulation entered into today at this office with Mr. Geo. R. Peck, General Counsel for the road. There is also enclosed a copy of the stipulation executed by the Company in respect to its road through the Helena National Forest. The stipulation to be executed by the Company in this case will be as nearly as practicable like that executed in the Helena case.

Please examine carefully the enclosed copy of the Helena stipulation and at the earliest practicable date submit your report on Form 964, giving particular attention to the question of the width necessary

to be cleared in order to protect the Forest from fire. [31]

Mr. R. H. R. -2-

By separate letters, you will be fully instructed in regard to the cutting and payment for timber, and how to prepare your part of the report affecting the timber.

Very truly yours,
(Signed) G. F. POLLOCK,
Chief.

Enclosure. [32]

Exhibit "G" [to Complaint—Stipulation].

UNITED STATES DEPARTMENT OF AGRICULTURE.
FOREST SERVICE.

Chicago, Milwaukee & St. Paul Railway Co. of Idaho—Application for Right of Way—Coeur d'Alene National Forest.

WHEREAS, a part of the proposed railroad right of way of the Chicago, Milwaukee, and St. Paul Railway Company of Idaho (hereinafter designated as "The Company"), as shown by a certain map of location filed by the Company in the Department of the Interior on March 20, 1907, under the Act of March 3, 1875, will be located within the Coeur d'Alene National Forest, Idaho; and

WHEREAS, the regulations of the United States Department of the Interior concerning rights of way for railroads, reservoirs, canals, etc., provide that whenever such rights of way are located upon National Forests, the applicant must enter into such

stipulations and execute such bonds as the Secretary of Agriculture may require for the protection of the National Forests; and

WHEREAS, the Secretary of Agriculture requires for the protection of said Coeur d'Alene National Forest that the Company shall enter into the stipulation hereinafter set forth:

NOW, THEREFORE, the Company does hereby stipulate and agree, and does bind itself, its successors and assigns, as follows, to wit:

1. To clear and keep clear of all timber and other inflammable substance all of said right of way and all other lands controlled by the Company as a right of way, however acquired, between the points where the center line of said [33] right of way intersects the exterior boundary lines of said Forest, and all lands in said Forest lying within 200 feet of said center line on the uphill side of said center line, and being contiguous to said right of way; but the Forester may in writing, specifically exclude from the operation of this clause such land as he deems proper, as for example, when a stream, the right of way of another company, of adequate fire break lies between the right of way of the Company and the said Forest; to dispose of all brush and other refuse in such clearing as required by the Forest Officer in charge; to cut all trees when physically possible so that they fall entirely within the strip to be cleared under this Clause; to remove all timber that when cut on the strip to be cleared may fall without the strip.

2. To pay to the Fiscal Agent, Forest Service at Washington, D. C., for all timber to be cut within

said right of way and within the additional strip referred to in Clause 1 hereof, which at the time of cutting belongs to the United States, between the east boundary of said Forest and the north side of Section 15, Township 45 North, Range 5 East, the lump sum of $27,906.90, such payment being at the rate of $4.00 per thousand feet B. M. for the saw timber to be cut.

3. To pay to the said Fiscal Agent of the Forest Service, when requested by the Forest officer in charge, for all timber cut within that part of said right of way and the additional strip to be cleared, referred to in Clause 1 hereof, which lies in approximately Secs. 15, 16, 17, 18, and 7, Township 45 North, Range 5 East, and Sec. 12, Township 45 North, Range 4 East, which at the time of cutting is the property of the United States, at the rate of $4 per thousand feet B. M. log scale, for all usable or merchantable timber cut or destroyed, including dead, timber standing and down, on National [34] Forest land and invalid claims in the occupancy of this right of way, according to the scale of the Forest Officers.

Logs will be scaled according to the Scribner rule, Decimal C, by the Forest Officer in charge, and in case of a dispute, the decision of the Forester will be final.

Logs will be decked or skidded for scaling, and no logs shall be removed from National Forest land until scaled by a Forest Officer. Logs will be scaled at least every seven days.

The minimum diameter limit to which logs are to

be scaled is 6 inches. Logs over 16 feet in length will be scaled as 2 or more logs, and pieces of timber less than 6 feet in length which contain lumber of any merchantable grade will be scaled as being 6 feet in length.

All tops, lops, and other refuse, including unmerchantable timber of every description, will be disposed of at such times and in such manner as may be required by the Forest Officer in charge.

4. To cut no timber outside of said right of way and additional strip referred to in Clause 1 hereof, except by special permit in accordance with the rules and regulations.

5. To construct and maintain in good and passable condition across said right of way, free of any charge or expense to the United States, crossings for all such now existing roads and trails intersected by the Company's railroad within said National Forest as may be mutually agreed upon as necessary and practicable.

6. The Company, its employees, contractors, and employees of contractors shall, both independently and at the request of the Forest Officers, do all in their power to prevent and suppress fires (but this shall not be considered as authorizing the Forester to require the Company to use oil as [35] fuel in its locomotives.

7. To pay to the United States, through the Fiscal Agent, Forest Service, Washington, D. C., for any and all damages caused by fires or otherwise sustained by the United States by reason of the use and occupation of said National Forest by the Company,

its successors, and assigns; and it is agreed by the parties hereto that if any damage shall occur to the National Forest lands by fires started by the Company on other land, the liability of the Company for such damage shall be determined by the laws of the State of Idaho or the United States, if applicable thereto.

8. The Company hereby gives permission to the Forest Service of the United States to install and maintain telephone instruments in the railroad stations in said National Forest; and also agrees to furnish pin room on its poles along said right of way, and to permit the Forest Service to string its telephone wires upon the Company's poles; train crews shall notify station agents of fires and of their direction and distance from the station by the quickest practicable method. And the station agents of the Company shall notify the Forest Officers by means of such telephones of fires within said National Forest coming to their knowledge.

If hereafter the Forest Service shall, with the cooperation of the officials of railway companies of the United States operating railroads in National Forests, secure the adoption of a code or system of signals from locomotives, to give information to station agents of fires, then the railway Company agrees to adopt and put into effect such code or system.

9. No person undergoing a sentence of imprisonment at hard labor shall be employed in any construction or other work upon this right of way. (See Executive Order May 18, 1905.) **[36]**

10. To make any assignment or transfer of its

right of way through said National Forest expressly subject to the fulfillment of all the conditions herein contained by the assignee or transferee.

IN WITNESS WHEREOF said corporation has caused these presents to be executed, and its corporate seal to be hereto affixed at ..... on this .... day of ....., 1907, by its President and Agent hereto duly authorized.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO.

By: .....,

(Its President.)

[Corporate Seal] Attest:

(Endorsement Filing.) [37]

Demurrer.

(Caption.)

This defendant, not confessing all or any of the matters and things in said bill of complaint herein to be true as therein alleged, doth demur:

I.

To so much of said bill as alleges that this defendant has thrown, rolled and deposited, and is throwing, rolling and depositing, great quantities of rock, earth, gravel and debris in the Saint Joseph River in divers places adjacent to said pretended right of way, whereby said Saint Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation, and will continue to be unfit and useless for purposes of navigation and log-driving until said rock, earth, gravel and debris is

removed therefrom; for the reasons (1) that the said complainant has no interest in said matter; (2) that the defendant is not answerable as to said matters to the said complainant, but to the State of Idaho; (3) that the said complainant is not entitled to any relief with respect to said matters.

II.

To so much of said bill as charges that this defendant, through lack of proper precaution against fire has set and caused to be set numerous fires along, upon and adjacent to said pretended right of way, and has thereby burned and destroyed and caused to be burned and destroyed, a large amount of timber young growth and seedlings, to wit: 4,045,700 feet, board measure of merchantable timber, and 1344½ acres of seedlings upon the lands specifically described in said bill of complaint; for that there is no equity in such matter and the said complainant has, as to such matters, a plain, speedy and adequate remedy at law. [38]

III.

To so much of said bill as charges that this defendant is setting and causing to be set fires along, upon and adjacent to said pretended right of way; and is burning and destroying, and causing to be burned and destroyed, great quantities of timber, young growth, and seedlings, to the damage of said complainant; for that there is no equity in such matters; and that said complainant has, as to such matters, if true, a plain, speedy and adequate remedy by the ordinary processes of law; and for the further reason that said acts, if done wilfully and intentionally,

are punishable by indictment and under the laws of the United States defining and providing for the punishment of misdemeanors and felonies.

IV.

To so much of said bill as charges that the said defendant has cut and caused to be cut upon the said strip of land one hundred feet in width on each side of the center line of defendant's right of way, and prays relief with respect thereto; for that it appears from the face of said bill that the said defendant had full right and authority to so cut and cause to be cut, and remove and cause to be removed, said timber; and for the further reason that there is no equity in said matters, or any thereof.

V.

To so much of said bill as charges that the said defendant has cut and removed, and caused to be cut and removed, a large amount of timber upon an additional strip of land upon the uphill side of said right of way, and upon land adjacent to said strips; for that it appears from the face of said bill that there is no equity in said matters, or in any thereof.

VI.

To so much of said bill as charges that the said defendant has cleared and caused to be cleared, and is clearing and causing to be cleared, portions of said lands for the purpose of constructing a railroad, and has constructed and caused to be constructed, [39] and is constructing and causing to be constructed, a railroad; and has conducted and is so conducting its operations that it has destroyed and caused to be de-

stroyed, and is destroying and causing to be destroyed large amounts of small timber and young growth upon the land theretofore described in said bill, through unskilled methods of lumbering, for the reason that it appears upon the face of said bill that there is no equity in said matters.

VII.

To said bill for that the same is multifarious in this: That the said complainant has joined in said bill matters for which the said complainant has a plain, speedy and adequate remedy at law with matters of equitable cognizance, the said matters being separate and distinct; that the said complainant has joined in said bill a cause of action arising out of an obstruction of a highway of the State of Idaho, and with which the said complainant has nothing to do, with a cause of action for damages arising out of alleged negligent acts of said defendant in setting out fires and thereby burning and destroying timber, together with an alleged cause of action for wilful waste and continuous trespass.

VIII.

To the said bill for that the same is without equity and does not set forth any matters entitling said complainant to any relief in this court.

WHEREFORE defendant prays the judgment of this court whether it shall be compelled to further answer make unto the respective parts of said bill demurrer to as hereinbefore set forth, and as to

whether it shall be compelled to further answer make unto said bill.

(Solicitors' Signatures.)

(Verifications.)

(Filing endorsement.) [40]

Exceptions to the Bill.

(Caption.)

Exceptions taken to the bill in said cause filed for expunging the impertinent matter therein contained.

I.

Defendant excepts to so much of said bill as is included within the second paragraph thereof, for that the same is impertinent.

II.

Defendant excepts to so much of said bill as is contained in the following words "and while said order of withdrawal was in full force and effect," contained in the first and second lines of the third paragraph of said bill, for that the same is impertinent.

III.

Defendant excepts to the following paragraph three of said bill, viz.: "and including, except for some minor omissions not material to be mentioned, the lands embraced in said temporary withdrawal of March 21, 1905," for that the same is impertinent.

IV.

Defendant excepts to so much of said bill as is contained in the following words, "temporar*ily* withdrawal," in the fourth line from the bottom of the

third paragraph of said bill, for that the same is impertinent.

V.

Defendant excepts to so much of said bill as is contained in the following words "to the said order of withdrawal and," in the second line from the bottom of the third paragraph of said bill, for that the same is impertinent.

VI.

Defendant excepts to so much of said bill as is contained in the following words "and while said order of withdrawal was in full force and effect," beginning in the first line of the fifth paragraph [41] of said bill, for that the same is impertinent.

VII.

Defendant excepts to so much of said bill as is contained in the following words "by said order of withdrawal of March 21, 1905, and subsequently," in the second and third lines from the end of the fifth paragraph of said bill, for that the same is impertinent.

VIII.

Defendant excepts to so much of said bill as is contained in the following words "by said order of withdrawal of March 21, 1905, and," in the second line from the end of the sixth paragraph of said bill, for that the same is impertinent.

IX.

Defendant excepts to so much of said bill as is contained in the following words "by said order of withdrawal of March 21, 1905, and," near the end of the seventh paragraph of said bill, for that the same is impertinent.

X.

Defendant excepts to so much of said bill as is contained in the following words "in accordance with the usual practice, and procedure of the General Land Office," in the first subdivision of the sixth paragraph of said bill, for that the same is impertinent.

XI.

Defendant excepts to so much of said bill as is contained in the following words "in accordance with the usual practice and procedure of the General Land Office" in the first subdivision of the seventh paragraph of said bill, for that the same is impertinent.

XII.

Defendant excepts to the matters and things set forth and contained in the eighth paragraphs of said bill beginning with the words "on May 10, 1907," at the beginning of the said paragraph and ending with the words "a copy of which, marked Exhibit 'F,' is hereunto attached and made a part of this complaint," near the middle [42] of said paragraph, for that the same are impertinent.

XIII.

Defendant excepts to so much of said bill as is contained in the following words, "the execution of said agreement of," and in the words, "and the said giving of permission for advance construction thereunder"; and in the words, "availed itself of all the advantages, benefits, and privileges given and conferred by the said agreement and affirmed the same, and by virtue thereof was by said Forester permitted to and," and in the words, "in advance of such

approval or any approval of any map of its said railroad," and in the words "after defendant had ratified and affirmed said agreement and had been engaged in performing the acts set forth in the tenth paragraph of this complaint, said," all contained in the last half of the eighth paragraph of said bill of complaint, for that the same are impertinent.

XIV.

Defendant excepts to so much of said bill as is contained in the following words, "except under the terms and conditions of the said agreement mentioned in the eighth paragraph hereof," beginning in the fourth line of the tenth paragraph of said bill, and in the words, "except under the terms and conditions of the said agreement mentioned in the eighth paragraph hereof, and in violation of the said agreement," near the end of the first subdivision of the tenth paragraph of said bill, for that the same are impertinent.

XV.

Defendant excepts to so much of said bill as is contained in the following words, "reasonable in all its conditions, terms and provisions, necessary for the protection of the Coeur d'Alene National Forest and of the public interest to be affected by said proposed right of way, and as nearly as practicable like the said stipulations executed by the defendant on January 18, 1907, in respect to its railroad within the Helena National Forest, referred to in the eighth paragraph of this complaint," beginning in the fourth line of the ninth [43] paragraph of said bill, for that the same is impertinent.

XVI.

Defendant excepts to so much of said bill as is contained in the following words, "the Secretary of the Interior determined and decided that the public interest will be injuriously affected unless the stipulation in question is executed and filed by the defendant, and on said date and prior to the institution of this suit," near the middle of the ninth paragraph of the said bill, for that the same is impertinent.

XVII.

Defendant excepts to so much of said bill as is contained in the following words, "And likewise, heretofore, and on October 29, 1908, and prior to the institution of this suit, said map, by order of the Secretary of the Interior, was rejected and stricken from the files of the Department of the Interior, and returned to the defendant without being approved by the Secretary of the Interior, and," for that the same is impertinent.

XVIII.

Defendant excepts to that portion of said bill contained in the words, "and has thrown, rolled and deposited and is throwing, rolling and depositing great quantities of rock, earth, gravel and debris in the Saint Joseph River in divers places adjacent to said pretended right of way, whereby the said Saint Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log-driving, and will continue to be unfit and useless for purposes of navigation and log-driving until said rock, earth, gravel and debris is removed therefrom," said words beginning at about

the tenth line after the first series of land descriptions contained in the tenth paragraph of said bill, for that the same is impertinent.

For which reasons this defendant excepts to said bill and prays that such impertinent matters be expunged therefrom.

(Signed by Solicitors for Defendant.)

(Endorsement Filing.) [44]

Memorandum Decision [on Demurrer and Exceptions to Bill].

(Caption.)

DIETRICH, District Judge.

Upon consideration it is decided that the bill exhibits facts sufficient to entitle the complainant to equitable relief; and upon the whole it is thought proper to deny both the objections interposed by the demurrer and those raised by the exceptions for impertinence to certain portions of the bill as involving claims cognizable at law, with the understanding that unless some other course shall be agreed upon a hearing will first be had upon such issues as relate strictly to the prayer for equitable relief, and that thereupon, if complainant prevails, it be determined whether the other issues shall be here tried out or as to them the complainant be remitted to its remedies at law.

Orders will therefore be entered denying both the demurrer and the exceptions to the bill.

(Filing endorsement.) [45]

[Order Overruling Demurrer to Complaint and Denying Exceptions Thereto].

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Boise, Idaho, on Tuesday, the 15th day of February, 1910. Present: HON. FRANK S. DIETRICH, Judge.

Northern Division—No. 403.

THE UNITED STATES

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation.

On this day was announced the decision of the Court upon the demurrer to the bill of complaint herein and upon the exceptions thereto, heretofore submitted to the Court, which decision is in writing and on file in said cause and is to the effect, and it is hereby ordered that said demurrer to the said bill of complaint be and the same is hereby overruled and the said exceptions thereto are hereby denied. [46]

Answer.

(Caption.)

The answer of the Chicago, Milwaukee & St. Paul Railway Company of Idaho, the defendant above named, to the bill of complaint herein:

This defendant, saving and reserving unto itself the benefit of all exceptions to the errors and imper-

fections in said bill contained, for answer unto so much thereof as it is advised it is necessary or material for it to answer unto, does aver and say:

I.

It admits that it is a corporation organized and existing and operating a railroad in and through the district of Idaho, substantially as charged in the first paragraph of said bill; and it avers the fact to be that it had, prior to the filing of said bill, constructed, completed, and was operating said railroad, from a point on the eastern boundary to a point on the western boundary of said State of Idaho.

II.

Defendant denies that on March 21, 1905, or at any time the Commissioner of the General Land Office, for or on behalf of the Secretary of the Interior and the President of the United States, or of either of said officers, did, by his order duly made or published on said date, or at any time, either in order to effectuate the will of Congress as expressed in the Act of March 3, 1891 (26 Stat. 1103), or the Act of June 4, 1897 (30 Stat. 34 and [47] 36), or any will of Congress whatsoever, withdraw, either temporarily or at all, from all, or any, sale or disposal, either pending a decision of the President as to the advisability of creating a national forest thereof, or at all; and make a reservation, or make a reservation, of a large body, or of any, vacant unappropriated public lands, or any lands, of the complainant situate, lying or being within the limits of the state and district.

This defendant admits and avers that it is informed and believes that on or about March 21, 1905,

the Commissioner of the General Land Office made and issued a certain pretended order directing and requiring the withdrawal from all sale and other disposal, except under the mineral laws, and pending a decision by the President as to the advisability of creating a national forest reserve thereof, a large body of vacant and unappropriated public lands situated within the limits of the State and district of Idaho; and admits that many of the lands described in the said bill were described in said order as included within the terms thereof; but this defendant is not advised, does not know, and cannot in this answer set forth, as to the exact terms and provisions of said pretended order; and it prays leave, should such order and its contents become material to be considered in the hearing of this cause, to procure and refer to a duly certified copy thereof. But this defendant further avers that said order was so made by the said Commissioner wholly without authority either of law, or from the President of the United States or the Secretary of the Interior, or at all; and that the making thereof was in excess of any authority vested in the said Commissioner; and said order was wholly void and of no effect.

III.

This defendant admits that on November 6, 1906 (but not while said order of withdrawal was in full, or any, force or effect; and said defendant denies that such pretended order was ever in full or any force or effect), the President of the United States, [48] by his proclamation duly made and issued on said date, did, by virtue of, and in accordance with,

the authority conferred upon by Section 24 of the Act of Congress approved March 3, 1891, entitled, "An Act to repeal timber culture laws and for other purposes" (26 Stat. 1103), set apart as a public reservation to be known as the Coeur d'Alene Forest Reserve, a large body of the public lands of the said complainant situate, lying and being within the limits of the State and district of Idaho; and admits that the bodies of land so created into a forest reserve, have, since the date of such proclamation, constituted and been, and now constitute and are, a part of the public forest reserve so created. And said defendant is informed and believes, and upon such information and belief admits, that, except for some minor admissions, the lands described in the proclamation creating such reservation, and therein designated as a part of such reserve, were lands described in the Commissioner's pretended order of withdrawal of March 21, 1905, and thereby attempted and pretended to be withdrawn; but this defendant denies that said lands, or any thereof, had been embraced in a temporary withdrawal, or any withdrawal, either on March 21, 1905, or at any time. And further answering this defendant avers that as to what extent, if at all, or any of said lands described in said proclamation of November 6, 1906, were thereby reserved from sale, entry, settlement or other disposal, defendant knows not and has not been informed save by the complainant's said bill, and cannot set forth as to its belief, or otherwise, further or other than this, to wit: That said lands were not, nor was any thereof, by said proclamation

reserved from sale, entry, settlement, or other disposal, to any greater extent, and said proclamation had no [49] other or greater, force or effect, than as prescribed in said Act of Congress approved March 3, 1891 (26 Stat. 1103); and this defendant further avers that said proclamation did not in or of itself, or by the creation of any reservation, divest or in any wise impair, any rights, privileges or authorities whatsoever in or over said lands, or any thereover, theretofore created and then existing. And as to the validity and effect of said proclamation, this defendant prays the judgment of this Honorable Court upon the production of said proclamation by the complainant as by it offered in said bill.

IV.

This defendant admits that on February 11, 1904, the Secretary of the Interior publicly promulgated certain regulations purporting to prescribe rules and regulations to be complied with by persons and corporations filing maps in order to obtain rights of way for railroads over and across forest reserves; and admits that such regulations contained, among other things, the matters set forth in the first quotation in the fourth paragraph of the bill of complaint herein; but for a more full, complete and accurate statement of the provisions thus promulgated, this defendant begs leave to refer to the publication thereof contained in Volume 32 of the Decisions of the Department of the Interior relating to Public Lands, on page 481 and the succeeding pages of said volume.

And this defendant further admits that on April

25, 1906, the said Secretary of the Interior publicly promulgated certain further regulations; and admits that said further regulations contained, among other things, the matters set forth in the second quotation in the fourth paragraph of the said bill of complaint; but for a more full, complete and accurate statement of the regulations thus promulgated, this defendant begs leave to refer to the publication thereof contained in Volume 34 of the Decisions of the Department of the Interior relating to Public Lands, beginning on page 583 thereof. **[50]**

But this defendant denies that such regulations were so promulgated in accordance with the discretionary, or any, authority conferred upon such Secretary by the Act of Congress approved March 3, 1899 (30 Stat. 1233), entitled "An Act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1899, and for prior years and for other purposes," or by any Act of Congress; and denies that such regulations were so promulgated in order to prevent the approval of applications for rights of way in cases when, in the judgment of said Secretary, the public interests would be injuriously affected thereby; and denies that said regulations were so promulgated for the protection of the public interests as being necessary prerequisites for the protection of such interests; and denies that such regulations are for the protection of the public interests, or are necessary prerequisites, or prerequisites, at all, for the protection of such interests. And this defendants avers that such regulations are, for the most part, unauthorized

and in excess of any authority conferred by law upon the said Secretary; and are, in many respects, prohibited by the laws of Congress, and were so promulgated by mistake of law; and this defendant particularly avers that the provisions of said regulations set forth in paragraph four of said bill of complaint are unauthorized, illegal and void.

V.

This defendant admits that on October 23, 1906, it filed in the United States Land Office at Coeur d'Alene, Idaho, a certain map, and that the copy thereof attached to said bill as Exhibit "A" is substantially correct; and avers that the said map represented and showed a profile, survey and plat of the railroad which said defendant had surveyed, staked out and located through certain lands of the United States; and admits that the said lands traversed by said proposed railroad line are those certain lands described in the fifth paragraph of said bill. But this defendant denies [51] that said map was filed while said order of withdrawal was in full, or any, force or effect; and denies that all or any of the lands described in the fifth paragraph of said bill were included in the lands reserved from entry and sale by said alleged order of withdrawal of March 31, 1905; and this defendant avers the fact to be that the said alleged order of withdrawal was a nullity and totally without force or effect, and did not operate to withdraw or reserve from entry or sale any lands whatsoever. Defendant admits that said lands were included within the lands described in said proclamation of November 6, 1906; but as to the force and

effect of said proclamation, and as to the extent that the lands therein described were reserved from sale or entry, this defendant knows not and has not been informed save by complainant's said bill, and cannot set forth as to its beliefs or otherwise, further, other or different than as hereinbefore in the fourth paragraph of this answer it has set forth; and it begs leave to here refer to said fourth paragraph of said answer relating to said proclamation, and to make the same a part of this paragraph so far as *the* relates to said proclamation, and the effect thereof, to the same extent as if said matter were herein set forth.

And this defendant further answering, avers: That February 17th, 1906, the Secretary of the Interior accepted for filing, and duly filed, under the provisions of the Act of Congress approved March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States," and the regulations of the Interior Department thereunder, the following papers which were then and there tendered to said officer by this defendant for such acceptance and filing, viz.: a copy of the articles of incorporation of said defendant, duly certified to by the Secretary of State of the State of Idaho; a copy of the laws of the State of Idaho under which this defendant was organized, with the certificate of the Secretary of State of the State of Idaho that the same was the [52] existing law of said State; an official statement under the seal of said company duly attested by the Secretary thereof, that the organization of said company had been com-

pleted; and that said defendant was fully authorized to proceed with the construction of its proposed railroad according to the existing law of the State of Idaho; a certificate by the President of said defendant company, under the seal of said company, showing the names and designations of its officers at the time of the filing of the proofs; and this defendant at said time duly tendered for filing and the said Secretary of the Interior of the United States duly accepted for filing, and filed, all documents and papers whatsoever prescribed by said Act of Congress approved March 3, 1875, and the regulations thereunder (save and except the map of the location of its proposed railroad, which said map of the original survey and location was filed in the United States District Land Office at Coeur d'Alene, Idaho, and is the map referred to in the fifth paragraph of said bill of complaint, and there admitted and charged to have been filed October 23, 1906), and said documents and papers have since remained, and are now, on file in the office of the Interior Department of the United States; and said defendant thereupon became and was identified as a grantee of the grants, rights, privileges and authorities conferred by said Act of Congress approved March 3, 1875; and said defendant thereupon became, and has since remained, entitled to all the rights, privileges, grants and authorities conferred by said Act of Congress upon railroad companies accepting and complying with the provisions of said act. And this defendant further avers that the said map of the location of its said railroad filed by it in the United States District Land Office

at Coeur d'Alene, Idaho, was so filed by it under the provisions of said Act of Congress approved March 3, 1875, and [53] the regulations of the Interior Department of the United States thereunder, to the end that the right of way granted to it by said Act of Congress approved March 3, 1875, might be given precision and attach to the specific lands so granted.

And this defendant further avers that thereafter, said defendant having duly amended its articles of incorporation, as prescribed by the laws of the State of Idaho, it, on, to wit: November 16th, 1906, duly tendered for filing in the Interior Department of the United States, with the Secretary of the Interior, and such officer duly accepted and caused to be filed, a certified copy of the said amended articles of incorporation, in manner and form as prescribed by the said regulations of the Interior Department for the filing of such papers under the provisions of said act of March 3, 1875.

VI.

This defendant admits that on March 20, 1907, and prior to any formal approval of said map of October 23, 1906, by the Secretary of the Interior, this defendant filed in the United States District Land Office at Coeur d'Alene, Idaho, another and second map, and admits that said second map purported to be, and avers that it was, an amended map representing the profile, survey and plat of said defendant's proposed railroad through lands belonging to the said complainant; and admits that said proposed railroad, as indicated and shown on said map crossed the complainant's lands substantially as charged in

the sixth paragraph of said bill of complaint.

But this defendant denies that the right of way for said proposed railroad differs almost wholly from the right of way for said railroad as shown on said map of October 23, 1906; and this defendant avers that after the filing of said map of October 23, 1906, said defendant caused further and additional surveys to be made and ascertained and determined that by a change in the location of certain portions of said original [54] location, a better and more economical route would be obtained, by the adoption of which the interests of said defendant and of the public would be promoted; and said defendant did thereupon adopt such amended location, and filed the map of such amended location in the United State District Land Office at Coeur d'Alene, Idaho, as charged in the sixth paragraph of said bill of complaint. That Exhibit "A" hereunto attached and hereby referred to and made a part hereof, is a map of said line as indicated on said map filed October 23, 1906, and of the said line as shown on said map filed March 20, 1907, as well of a second amended line surveyed and adopted as hereinafter set forth; and truly and correctly indicates the said lines as the same were set forth and shown on the original maps thereof filed in the office of the district land officers at Coeur d'Alene, Idaho, as charged in said bill; and said defendant begs leave to refer thereto for the purpose of conveniently showing the exact extent of the changes made in said original line by said amended lines. That the respective lines, as shown on said Exhibit "A" are indicated thereon, and dis-

tinguished by the legends on said map showing the dates of filing the maps of said lines in said United States District Land Office.

Said defendant denies that the said map filed October 23, 1906, was returned to said defendant without being approved by the Secretary of the Interior, or was returned at all; and said defendant denies that all, or any of the lands described in the sixth paragraph of said bill of complaint were included in the lands reserved from disposal and sale by said alleged order of withdrawal of March 21, 1905; and this defendant avers the fact to be that the said alleged order of withdrawal was a nullity, and totally without force or effect, and did not operate to reserve from disposal or sale any lands whatsoever. Defendant admits that said lands were included within the lands described [55] in said proclamation of November 6, 1906; but as to the force or effect of said proclamation, and as to the extent that the lands therein described were reserved from sale or entry, this defendant knows not and has not been informed save by complainant's said bill, and cannot set forth as to its belief or otherwise, further or different than as hereinbefore in the fourth paragraph of this answer referring to said proclamation; and it begs leave to here refer to said fourth paragraph of this answer so far as the same relates to said proclamation, and to make the same a part of this paragraph, with like effect and to the same extent as if said matter were here repeated and set forth.

VII.

And this defendant admits that on May 10, 1907,

and while said map filed on March 20, 1907, was still unapproved by the Secretary of the Interior, it filed in the United States District Land Office at Coeur d'Alene, Idaho, another or third map; and admits that said map purported to be, and avers that it in fact was, a further or second amended map representing the profile, survey and plat of said defendant's proposed railroad through lands belonging to said complainant; and it further admits that the map shown on Exhibit "B" attached to said bill of complaint is a correct copy of said map so filed in said district land office; and admits that the lands of complainant crossed by said proposed lines are substantially as set forth and charged in the seventh paragraph of said bill of complaint.

But this defendant denies that the right of way of said proposed railroad differs materially from both, or either, of the proposed rights of way as shown on said maps filed October 23, 1906, and March 20, 1907; or differs from either of said lines to any other or greater extent than as shown upon Exhibit "A" [56] hereunto attached. And this defendant further avers that subsequent to March 20, 1907, and prior to May 10, 1907, said defendant had caused further and additional surveys of its said proposed railway line to be made; and had thereby ascertained and determined that by a slight change in the location thereof definitely and clearly shown upon said Exhibit "A" hereunto attached, a better and more economical route than the routes indicated upon said prior maps would be obtained, by the adoption of which the interests of the said defendant and of the

public would be promoted and advanced; and that said defendant did thereupon adopt such second amended location, and filed the map of such amended location in the said United States District Land Office at Coeur d'Alene, May 10, 1907, as charged in said bill of complaint. That at said time, as well as at the times when said prior maps were so filed, the lands traversed thereby were all, or nearly all, public lands of the United States and were vacant and unoccupied; and that by said changes the interests of the complainant as well of this defendant were subserved and advanced.

And this defendant denies that the said map filed March 20, 1907, was returned to this defendant without being approved by the Secretary of the Interior, or at all; and denies that all, or any of the lands described in the seventh paragraph of said bill of complaint were included in the lands reserved from disposal or sale by said alleged order of withdrawal of March 2*L*, 1905; and this defendant avers the fact to be that the said alleged order of withdrawal was a nullity and totally without force or effect, and did not operate to reserve from sale or disposal any lands whatsoever. Defendant admits that said lands were included within the lands described in said proclamation of November 6, 1906; but as to the force and effect of said proclamation, and as to the extent that the lands therein described [57] were reserved from disposal or sale thereby, this defendant knows not and has not been informed save by complainant's said bill, and cannot set forth as to its belief or otherwise, further or different than as hereinbefore in the

fourth paragraph of this answer it hath set forth and answered with respect to said proclamation; and it here begs leave to refer to the said fourth paragraph of this answer so far as the same relates to said proclamation, and to make the same a part of this paragraph, with like effect and with the same extent as if said matter were here repeated and set forth.

But said defendant further avers that said proclamation was wholly and utterly without force and effect to prevent or hinder the grants, rights and privileges and authorities vested in this defendant under the terms and provisions of said Act of Congress approved March 3, 1875, and its compliance with the provisions thereof and requirements thereunder, as hereinbefore set forth, from attaching to the lands within the terms and provisions of said proclamation.

This defendant admits that the said map, filed May 10, 1907, as aforesaid, has never been approved by the Secretary of the Interior for the reason that this defendant has neglected and refused to execute and file, or execute or file, a certain stipulation and bond prescribed and required by said Secretary and by the Secretary of Agriculture, as in said bill of complaint set forth; and said defendant avers that in truth and in fact the said Secretary of the Interior has refused to approve said map for no other or different reason. And this defendant further avers that the said Secretary of the Interior and the said Secretary of Agriculture, are, and each of them is, wholly and utterly without authority to require the execution or filing of

such stipulation or bond, and of each thereof; and that the [58] demand therefor is made arbitrarily, and that the execution and filing of such stipulation and bond, or of either thereof, is not required by any provision of law, nor is any demand for such execution and filing, or of such execution or filing of said papers, or of either thereof, authorized by any law or statute whatsoever; and that the refusal of said Secretary of the Interior to approve said map is wholly arbitrary and wrongful and in violation of the duties imposed upon such officer by the acts of Congress of the United States of America.

VIII.

This defendant denies that on May 10, 1907, or at any time, it, either for the purpose of securing immediate permission from the forester of *complaint's* forest service to begin construction of its railroad in the said Coeur d'Alene National Forest, Idaho, in advance of the approval by the Secretary of the Interior of its said map filed May 10, 1907, or for any purpose, promised or agreed, either by an instrument in writing, or at all, to execute and abide by, or to execute or abide by, stipulations and conditions to be prescribed by the said Forester in respect to said railroad, or any stipulations or conditions whatsoever, either as nearly as practicable like certain stipulations executed by the Chicago, Milwaukee & St. Paul Railway Company of Montana, on January 18, 1907, in respect to the railroad of said company within the Helena National Forest, Montana, or like any stipulations, or at all. And denies that thereupon, to wit, May 10, 1907, at any time, the said

forester in reliance upon and in execution of the terms of said agreement or in reliance upon or in execution of said agreement, or any agreement, by telegram, or otherwise, informed Richard H. Rutledge, forest supervisor of said Coeur d'Alene National Forest, or any one, that advance permission had been given defendant to construct its railroad through said Coeur d'Alene National Forest, and directed, or directed, said Rutledge, forest supervisor as aforesaid, [59] or to any one, to supervise the clearing or piling of brush, or to scale all, or any timber cut. But said defendant admits that on May 10, 1907, George R. Peck, its General Counsel, executed and delivered to the officers of the United States Department of Agriculture a certain paper writing, and that Exhibit "C" attached to the bill of complaint herein, is a copy thereof; and it admits that on said day said paper writing was approved by James B. Adams, acting forester, in manner and form as shown on said Exhibit "C." Said defendant admits that on January 18, 1907, said Chicago, Milwaukee & St. Paul Railway Company executed certain stipulations in respect to its railroad within the Helena National Forest, and that Exhibit "D" attached to the bill of complaint herein, is a copy of such stipulation. It admits that on May 10, 1907, one Pollock, who was, as defendant is informed and believes, a forester in the service of the United States, transmitted to Richard H. Rutledge, Forest Supervisor of said Coeur d'Alene National Forest, that certain telegram a copy of which is attached to said bill of complaint as Exhibit "E." Said defendant fur-

ther admits that on May 11, 1907, the instructions contained in said telegram were confirmed to the extent and in the manner set forth and shown in that certain letter, a copy of which is attached to the said bill of complaint as Exhibit "F."

Defendant denies that immediately after the execution of said agreement of May 10, 1907, and the giving of permission for advance construction thereunder, and continuously thereafter, until December 3, 1907, or at all, or at any time, it availed itself of all, or any advantages, benefits or privileges given and conferred, or given or conferred by said agreement, or any agreement, or affirmed the same; and denies that it was by virtue thereof or at all, by the Forester permitted to, in advance of such approval, or any approval of any map of its said railroad, begin [60] or carry on the actual, or any, construction of its said railroad in said Coeur d'Alene National Forest. And this defendant denies that there were any advantages, benefits or privileges whatsoever given or conferred by said alleged agreement; and avers that in truth and in fact, for the reasons hereinafter set forth, said purported agreement was a nullity and without force or effect whatsoever; and denies that the said Forester permitted, or had any authority to permit, or to refuse to permit, either in advance of the approval of any map of defendant's said railroad, or at all, the construction of said defendant's railroad, or had any authority whatsoever with respect thereto.

Defendant admits that on or about December 3, 1907, said George R. Peck, General Counsel for this

defendant, verbally informed the forester that the said defendant claimed that it ought not to be required to file any stipulation whatsoever; but said defendant denies that this was after said defendant had ratified or affirmed said agreement; and denies that it ever ratified or affirmed such agreement at all.

And further answering unto the matters and things charged in the eighth paragraph of said bill of complaint, defendant avers:

(a) That long prior to said proclamation of November 6, 1906, said defendant had, by virtue of its compliance with the provisions and requirements of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," and of the regulations of the Interior Department of the United States promulgated thereunder, as hereinbefore set forth and averred, become entitled to, and vested with, all of the grants, rights, privileges and authorities, conferred and granted, and intended to be conferred and granted, by the provisions of said act. That it had full right, power and authority to enter upon all or any of the lands [61] included within the terms of said proclamation and to locate and construct thereover its said railroad; and to take and have, for the purposes of such railroad, a right of way one hundred feet in width on each side of the central line of its said railroad; and the right to take, from the public lands adjacent to the line of said railroad, material, earth, stone and timber necessary for the construction of said railroad, without payment therefor, or for any thereof, to the United States, and

without permission from, or interference by, any of the officers or agents thereof. That the advantages, benefits, privileges, rights and authorities, and each and all thereof, alleges and charges to have been given and conferred by the said alleged agreement of May 10, 1907, were advantages, benefits, privileges, right and authorities which had all been theretofore granted and conferred upon the said defendant by the said Act of Congress approved March 3, 1875, and that the said alleged agreement was utterly and wholly without consideration.

(b) That long prior to the acceptance of the provisions of the said Act of March 3, 1875, by the Chicago, Milwaukee & St. Paul Railway Company of Montana, a corporation, by the filing of the certified copy of the articles of incorporation, and certified copy of the law of the State of Montana under which said company was organized, or the filing of any instruments whatsoever by the said railway company in the office of the Secretary of the Interior or of the Commissioner of the General Land Office, or in the office of the Register and Receiver of the Land Office for the district in which such lands were situated, the President of the United States had, by proclamation duly made and issued by authority of and in accordance with the authority conferred upon him by Section 24 of the Act of Congress approved March 3, 1891, entitled "An Act to repeal timber culture lands and for other purposes," proclaimed and set apart as a national forest reserve, to be known as the Helena National Forest, Montana, a large body of [62] public lands lying and being within the limits

of the State and District of Montana. That thereafter the said Chicago, Milwaukee & St. Paul Railway Company of Montana, a corporation organized under the laws of the State of Montana, being desirous of locating and constructing its railroad over and across a portion of said lands so reserved, duly accepted the terms and provisions of the said Act of March 3, 1875, and complied with the regulations of the Interior Department issued thereunder by duly filing a certified copy of its articles of incorporation and all other documents and papers required to be filed to secure the benefits and privileges of said Act. That thereafter, to-wit: January 24, 1907, the said railway company of Montana, to the end that it might secure the privilege or constructing its said railway over and across lands included within the said Helena Forest Reserve without interference from or hinderance by the officers and agents of the United States, made and entered into that certain stipulation, a copy of which is attached to the bill of complaint herein as Exhibit "D." That, to wit, on or about May 10, 1907, George R. Peck, the general counsel for the said defendant company, being then in Washington, D. C., and in conference with the officers of the Forest Service of the United States, and having informed the said officers that it was the purpose and intention of this defendant to construct its said railway extending across the State of Idaho, the said officers then and there informed the said George R. Peck that many of the said lands which would be traversed by said line of railroad had been withdrawn by proclamation of the President of the United States and

created into the Coeur d'Alene National Forest. Said officers then and there stated to the said George R. Peck that said reserve had been created prior to the filing of defendant's articles of incorporation and due proofs of the organization and the other documents required to be filed by the said defendant in order to entitle said defendant to the grants, rights, privileges and authorities conferred by the said [63] Act of Congress approved March 3, 1875, and further informed and advised the said George R. Peck that the situation of the said Coeur d'Alene National Forest with respect to the location and construction of the said defendant's railroad over and across lands included therein, was in the same condition as had been the situation of the said Helena National Forest with respect to the location and construction of the line of the said Chicago, Milwaukee & St. Paul Railway of Montana over and across lands therein. And the defendant avers upon information and belief that the said officers and agents of the United States in so advising and informing the said George R. Peck, acted under a mistake of fact and were ignorant of the fact that this defendant had, by compliance with the provisions and requirements of the said Act of March 3, 1875, and the regulations of the Interior Department thereunder, acquired and became vested with all the grants, rights, privileges and authorities conferred by said Act long prior to the creation of the said Coeur d'Alene National Forest. Said defendant further avers that the said George R. Peck was not informed, and did not know as to the time when the said Coeur d'Alene National

Forest had been created, and was not informed and did not know that this defendant had long prior thereto acquired and became vested with all the rights, privileges, grants and authorities conferred by the said Act of March 3, 1875. And the said George R. Peck believed and relied upon the statements made to him as aforesaid, that the situation of the said defendant with respect to the said Coeur d'Alene National Forest was the same as the situation of the said Chicago, Milwaukee & St. Paul Railway Company of Montana had been with respect to the said Helena National Forest. And that the said George R. Peck, relying upon such information signed that certain agreement, a copy of which is attached to the bill of complaint herein as Exhibit "C." That said stipulation was so entered into by the said George R. Peck, and by the said officers and agents of the United States under a mutual mistake of fact, and that [64] save and except for such mistake of fact the said George R. Peck would not have signed or executed said agreement.

Defendant further avers that at the time of the making of said agreement set forth in Exhibit "C," attached to the bill of complaint herein, the said George R. Peck was informed and advised by the officers and agents of the United States, and particularly by the officers and agents in the Interior Department of the United States and in the Forest Service of the United States, that this defendant had no right or authority to enter upon, locate or construct its said railway over or across any of the lands included within the President's proclamation of November 6,

1906, unless and until the said railway company should agree to enter into a stipulation substantially like that certain stipulation set forth in Exhibit "D" attached under the bill of complaint herein, and was further informed and advised by the said officers and agents of the United States that until such stipulation was signed by said defendant, or until the defendant had entered into an agreement to sign the same, that the said complainant would hinder, delay and prevent the construction of said railroad over and across any of the lands included within the said proclamation of November 6, 1906. That by such obstruction, hinderance and delay great financial loss would be inflicted upon this defendant; that the said George R. Peck, being misinformed as to the facts of said case, as hereinbefore set forth, and believing that the said United States could and would so hinder, delay, obstruct and prevent the construction of said railroad, and to prevent the said financial loss which the said Peck was induced to believe by said mistakes and misrepresentations would result, thereupon signed said paper writing a copy of which is attached to the bill of complaint herein as Exhibit "C."

(c) That this defendant is informed by its attorneys and believes, and upon such information and belief, avers the fact to be, that lands reserved for national forests are not thereby excluded [65] from the operations of the Act of Congress approved March 3, 1875, and that any railroad company accepting and complying with said Act of March 3, 1875, is authorized and empowered by the terms and

provisions of said Act to enter upon any lands within a national forest, and to locate and construct its railroad over and across such lands, or any thereof, and for such purposes, to take and have a right of way 100 feet in width on each side of the center line of said railroad, and to take from the lands of the United States adjacent to the line of said railroad material, earth, stone and timber necessary for the construction of said road without leave, authority or permission from the officers and agents of the United States, or any thereof, and without payment of compensation to the United States for such material or for any thereof.

That for the foregoing reasons this defendant has at all times refused to ratify or confirm the said agreement made by the said George R. Peck on May 10, 1907, and has at all times refused and does still refuse to execute a stipulation as nearly as practicable like that certain stipulation executed by the Chicago, Milwaukee & St. Paul Railway Company of Montana, July 18, 1907,a copy of which is set forth and attached to the bill of complaint herein as Exhibit "D."

This defendant admits that it did in the spring of 1907, but as to the exact date thereof this defendant cannot now show or set forth, enter upon the work of the construction of its said railroad across lands included in the said Coeur d'Alene National Forest, and did cut down and cause to be cut down timber upon the right of way of its said road as located and shown upon the said map filed May 10, 1907, and did continuously thereafter carry on said work of

construction until the same was completed. But this defendant further avers that in so doing it acted solely under and by virtue of the rights and authorities conferred upon it by [66] the Act of March 3, 1875, and secured to it by its compliance with the terms and provisions thereof as hereinbefore set forth; and it avers that it did not in the performance of said work, or of any thereof, act under or by virtue of any right, privilege or authority whatsoever, conferred upon it by the said agreement of May 10, 1907, or any agreement with any officer or agent of the United States.

IX.

Defendant admits that heretofore, and prior to the institution of this suit the Secretary of Agriculture prescribed a certain stipulation, and that Exhibit "G" attached to the bill of complaint, is a copy thereof; and admits that the said Secretary and the duly authorized officers and agents of complainant's Forest Service notified this defendant that he, the said Secretary of Agriculture, had prescribed such stipulation and required the defendant to enter into and execute the same for the protection of the said Coeur d'Alene National Forest and the public interest to be affected by the said proposed right of way; and defendant further admits that, to wit, on or about August 14, 1908, and prior to the institution of this suit, the Secretary of the Interior required this defendant to comply with said requirements of the Secretary of Agriculture as a condition precedent to the approval by the Secretary of the Interior of defendant's said map filed May 10, 1907. That as to

whether or not on October 10, 1908, the Secretary of the Interior determined and decided that the public interests would be injuriously affected unless the said stipulation was executed and filed by said defendant, this defendant does not know and has not been informed save by the complainant's said bill, and cannot set forth as to its belief or otherwise. But said defendant admits that on or about October 10, 1908, the Secretary of the Interior notified said defendant that unless [67] the said stipulation should be duly executed and filed within fifteen days from October 10, 1908, the said map filed May 10, 1907, would be rejected and stricken from the files of the Department of the Interior. And this defendant admits that it has refused and continues to refuse to enter into or execute any such stipulation or to pay said complainant, its officers or agents, for the timber it has cut upon the lands of the said complainant. But defendant denies that it is now cutting or intends to cut any further or other timber upon said lands, or any thereof. That as to whether or not on October 29, 1908, and prior to the institution of this suit, the said map was by order of the Secretary of the Interior, or at all, rejected or stricken from the files of the Department of the Interior, this defendant knows not and has not been informed save by complainant's said bill, and cannot set forth as to its belief or otherwise. But defendant denies that said map has been returned to this defendant either with or without being approved by the Secretary of the Interior; and defendant admits that no map, profile or survey or plat of said defendant's railroad other than as here-

inbefore set forth and mentioned, and as set forth and mentioned in said bill of complaint, has ever been filed or approved by the Secretary of the Interior.

Defendant denies that the said stipulation prescribed by the Secretary of Agriculture, a copy of which marked Exhibit "G" is attached to and made a part of said bill of complaint, is reasonable in all or any of its conditions, terms and provisions, or is necessary for the protection of the said Coeur d'Alene National Forest, or of the public interest to be affected by said proposed right of way; and said defendant denies that the said proposed stipulation is as nearly as practicable like the stipulations executed by this defendant on January 8, 1907, in respect to its railroad within the Helena National Forest referred to in the eighth paragraph of the said bill of complaint. And said defendant further [68] denies that it did on January 8, 1907, or at any time, execute any stipulation as to its railroad in the Helena National Forest, and denies that it has or ever had any railroad whatsoever within the said Helena National Forest.

And the said defendant avers that the second paragraph of the said proposed stipulation, by which this defendant is required to pay to the fiscal agent, Forest Service, Washington, D. C., for timber and wood cut within said right of way and within the additional strip referred to in Clause One of said stipulation, the lump sum of $27,906.90 *Dollars,* or any sum, is unauthorized by law, and is in conflict with the grants, rights and privileges conferred upon this defendant by the Act of March 3, 1875, hereinbefore referred

to; is inequitable and unjust. That said provision is unreasonable, and is not necessary for the protection of the said Coeur d'Alene National Forest, or of any thereof, or of any public interests affected by said proposed right of way. And said defendant further avers that the provisions of the Third Clause of said stipulation requiring this defendant to pay for all timber cut within that part of said right of way and the additional strip to be cleared as provided in Clause One of said stipulation, which lies approximately in Sections 15, 16, 17, 18 and 7 in township 45 north, of range 5 east, and Section 12, township 45, north, of range 4 east, at the rate of $4.00 per thousand feet for all usable or merchantable timber cut or destroyed, including dead timbers standing or down, on National Forest land, and invalid claims in the occupancy of said right of way, according to the scale of forest officers, or to pay for any of said timber at any price whatsoever, is in conflict with the rights, privileges, grants and authorities conferred upon this defendant by the said Act of Congress approved March 3, 1875; is inequitable and unjust. That said provision is not reasonable or necessary for the protection of the Coeur d'Alene Forest, or of any thereof, or of the [69] public interests to be affected by said proposed right of way. And this defendant further avers that the fourth clause of said stipulation, to wit, that this defendant shall cut no timber outside of said right of way and additional strip referred to in Clause One of said stipulation, except by special permit in accordance with the rules and regulations of the Forest Service of the Department of Agricul-

ture of the United States, is in conflict with the grants, rights, privileges and authorities conferred upon this defendant by the Act of Congress approved March 3, 1875.

That the provisions of the first, fifth and sixth clauses of said stipulation are in conflict with the grants, rights and privileges and authorities conferred upon this defendant by said Act of Congress approved March 3, 1875, and are wholly unauthorized.

And this defendant further avers that the provisions of the Seventh Clause of said stipulation, to wit, that said defendant shall pay to the United States for any and all damages caused by fires or otherwise, sustained by the United States by reason of the use and occupation of said National Forest by said defendant, its successors and assigns, is unreasonable, inequitable and unjust, and is in conflict with the grants, rights, privileges and authorities conferred upon this defendant by the said Act of Congress approved March 3, 1875, and that the provisions of said Clause Seven of said stipulation, that if any damage shall occur to the National Forest lands by fires started by said defendant on other land, the liability of the defendant for such damage shall be determined by the laws of the State of Idaho, or the United States, if applicable thereto, is redundant, is not, nor are any of the matters and things contained in said Seventh paragraph of said stipulation, necessary for the protection of the Coeur d'Alene Forest, or of any thereof, or of the public interests to be affected by said proposed right of way. [70]

And this defendant avers that the matters and

things required in the Eighth paragraph of the said stipulation are, each and all matters and things which the said officers of the Department of Agriculture or of the Interior Department of the United States, are not authorized to demand or require as a condition precedent to the enjoyment by the said defendant within the limits of said National Forest of the rights, privileges, authorities and grants conferred upon it by the said Act of Congress, approved March 3, 1875.

And defendant further avers that the requirement contained in the Ninth Clause of said stipulation, that no person undergoing a sentence of imprisonment at hard labor shall be employed in any construction or other work upon said right of way, is unreasonable, and is not necessary for the protection of the Coeur d'Alene National Forest, or of the public interest to be affected by said proposed right of way, or any thereof.

And this defendant further avers that the provisions contained in the Tenth Clause of said stipulation are in conflict with the rights, privileges, grants and authorities conferred upon this defendant by said Act of Congress, approved March 3, 1875.

And this defendant further avers that the values or prices placed upon timber in said proposed stipulation, are wholly exorbitant, extortionate and unreasonable; that such timber was not, and is not, nor was, nor is any thereof, of any greater value than fifty cents per thousand feet.

And this defendant further avers that the said Secretary of Agriculture was and is utterly and wholly without authority to prescribe such stipula-

tions, or to require this defendant to execute the same, or any thereof, as a condition precedent of being permitted to construct and operate its said railway through said [71] National Forest; and further avers that the Secretary of the Interior was wholly and utterly without authority to require this defendant to comply with said requirements of the Secretary of Agriculture as a condition precedent to the approval of the Secretary of the Interior of the said map filed May 10, 1907; and the said Secretary of the Interior was, and is, wholly and utterly without authority to reject or strike from the files of the Department of the Interior, or to refuse to approve, the said map filed May 10, 1907, because this defendant has refused to enter into or execute said stipulation or for any cause. And this defendant further avers that it is in truth and in fact and in equity fully entitled to all the rights, privileges, grants and authorities which it would have been entitled to if the said Secretary of the Interior had formally approved and filed the said map of May 10, 1907.

X.

Defendant denies that since a long time anterior to the filing of said second or third amended maps, or either thereof, or at all, or any time, since the said proclamation of November 6, 1906, it, without any authority from the said *complaint,* except under the terms and conditions of said agreement mentioned in the Eighth paragraph of said bill of complaint, or in violation of the law of the United States, or without any permission of any kind whatsoever from the said complainant, its officers or agents, except under the

terms and conditions of the said agreement mentioned in the said Eighth paragraph, has cut or caused to be cut, a large, or any, amount of timber; but this defendant admits and avers that since a long time anterior to the filing of said amended maps it has, under the rights, privileges, grants and authorities conferred upon it by the said Act of Congress approved March 3, 1875, cut and caused to be cut, a large amount of timber; and further avers that said timber, and each and all thereof, so cut or [72] caused to be cut by it as aforesaid, was cut and removed from the right of way granted to it by the terms and conditions of the said Act of Congress approved March 3, 1875, and secured by it by its compliance with the terms and provisions of said Act approved March 3, 1875, and the rules and regulations of the Interior Department thereunder, as hereinbefore set forth, or from public lands adjacent to the line of said road, which said last mentioned timber, cut, or caused to be cut as aforesaid, was so cut or caused to be cut for the purpose of obtaining material necessary for the construction of said road. And this defendant admits and avers that said acts were so done without complying or making any attempt to comply in any way whatsoever, with the regulations or conditions prescribed by the Secretary of the Interior, and set forth in said bill of complaint, and without entering into the stipulation which had been prescribed and required by the Secretary of Agriculture and the Secretary of the Interior as in said bill of complaint alleged.

That as to whether or not the quantity of said timber so cut was 8,996,530 feet, or as to what quantity

of said timber was so cut, and as to what lands the same was cut from, this defendant does not know, and has not been informed save by the complainant's said bill, and cannot set forth as to its beliefs or otherwise.

And this defendant avers that said cutting and the whole thereof, done in the course of the construction or said railroad, was done by independent contractors who had entered into an agreement with this defendant to construct and complete said road for this defendant. And said defendant has no definite information or knowledge as to the quantity of timber so cut or as to the lands from which the said timber was cut, further or other than this, to wit, that this defendant admits that a large portion of said timber so cut was cut from the lands included within its said right of way as defined and located by the said map filed May 10, 1907. [73]

And this defendant admits and avers that it has cleared and caused to be cleared, all of its said right of way, and said defendant denies that it is clearing or causing to be cleared any other portions whatsoever, either for the purpose of constructing a railroad, or for any purpose, but it admits and avers the fact to be that it had long prior to the commencement of this action constructed or caused to be constructed and completed its entire railroad in the said State and District of Idaho, and had completely cleared said right of way. And defendant denies that it has so conducted or is so conducting its operations that it has destroyed or caused to be destroyed, or is destroying, or causing to be destroyed, large, or any, amounts of small timber and young growth upon the lands de-

scribed in said bill, or any thereof, either through unskilled methods of lumbering, or otherwise, except as hereinstated; and it avers that in truth and in fact it has destroyed and caused to be destroyed small timber and young growth only upon the lands within the limits of its said right of way.

And this defendant denies that it has thrown, rolled or deposited, or is throwing, rolling or depositing, great, or any, quantities of rock, earth, gravel and debris, in the Saint Joseph River, either in divers places adjacent to said right of way, or in any places whatsoever, whereby the said Saint Joseph River has been or is obstructed, or rendered wholly unfit or useless or unfit or useless at all, for the purpose of navigation or log driving; and denies that the said Saint Joseph River will continue to be unfit or useless for purposes of navigation or log driving until said rock, earth, gravel and debris is removed therefrom, or will continue to be so unfit or useless at all, to any greater or further extent than the same was unfit and useless for such purpose prior to the time the said defendant entered upon the work of constructing its said railroad. And this defendant further avers that the [74] said Saint Joseph River has been at all times, and is, a waterway wholly within the State of Idaho: and avers that said stream is not, and never was, navigable water of the United States; and further avers that all of that portion of said stream above the Town of Ferrill, in the County of Kootenai, Idaho, including all that portion of said river described in the said bill of complaint, is a swift mountain stream, filled with rapids, rocks and obstructions,

and wholly unfit and useless for purposes of navigation.

And this defendant denies that through lack of proper precaution against fire, or at all, it has set, or caused to be set, numerous, or any, fires along, upon or adjacent to its said right of way, or elsewhere; and denies that it has thereby burned or destroyed, or caused to be burned or destroyed, a large, or any amount of timber, young growth, or seedlings, or any thereof; and it denies that it is setting or causing to be set fires or any fires whatsoever along, upon or adjacent to said right of way, or elsewhere, and denies that it is burning and destroying, or burning or destroying or causing to be burned and destroyed, or causing to be burned or destroyed, great, or any, quantities of timber, young growth or seedlings, or any thereof, to the further or any damage of said complainant, or at all.

XI.

And this defendant denies that anterior to or during the commission of any of the acts in said bill of complaint averred, said defendant was repeatedly, or at all, warned by the duly authorized officers and agents, or by any officers or agents of the complainant's Forest Service, to cease or refrain from cutting timber, or from committing any unauthorized acts of trespass or waste upon said National Forest, or upon said proposed right of way. And this defendant denies that it ever committed any acts of trespass or waste whatsoever upon said National Forest, or upon said proposed right of way; and denies that it was by said officers [75] and agents, or any officers

or agents whatsoever, repeatedly, or at all, warned from doing any construction work upon said proposed right of way or from operating a railroad thereon, until the stipulation prescribed and required by the Secretary of the Interior and the Secretary of Agriculture had been executed and filed in the General Land Office or until said map of definite location of said railroad and right of way had been approved by the Secretary of the Interior or at all; and denies that notwithstanding such warning and in defiance of the same this defendant did wrongfully or unlawfully fail or refuse either to execute or file the said stipulation prescribed and required by the Secretary of the Interior and the Secretary of Agriculture, or did wrongfully or unlawfully refuse to cease from the cutting and destruction of said timber, or any timber, or from committing any acts of trespass or waste whatsoever, or persisted knowingly to so trespass or to commit waste. And this defendant denies that it is now so trespassing and committing waste, or either thereof, upon the said National Forest or elsewhere, either without having any license permit or consent or other authority from or under the said complainant, or in utter disregard of its rights and law, or at all.

And this defendant avers that it has at all times since early in the year 1907, and subsequent to its acceptance of the terms and provisions of said Act of March 3, 1875, as hereinbefore set forth, and until the completion of its said railroad in the year 1909, proceeded with the work of construction, and has constructed and completed its said railroad extending through the State and District of Idaho, and along

and upon the right of way as indicated on said map filed May 10, 1907, and has during such construction cut and removed the timber standing, lying and being upon said right of way, and has taken from the public lands of the United States adjacent to said right of way, material, [76] earth, stone and timber for the construction of its said railroad. That it has during all of said times done and performed said acts openly and with the knowledge, consent and permission, and largely under the direction of the officers and agents of the United States, and particularly the officers and agents of the Interior Department, and of the Forestry Service of the Department of Agriculture of the United States; and that the said complainant has at all said times fully acquiesced in and consented to said work, and the whole thereof.

XII.

This defendant admits that it is its intention and purpose to continue to disregard the said requirements of the Secretary of the Interior and of the Secretary of Agriculture, but denies that it is its purpose or intention without executing and filing any such stipulation required as in said bill of complaint set forth, with the Secretary of the Interior or with the Secretary of Agriculture, or at all, or without waiting the approval of its said map or amended map of definite location, or without any other permit or license or grant from or under the authority of said complainant, or at all, to cut complainant's timber from its lands reserved and withdrawn from sale and disposal, or commit any unauthorized act of trespass or waste thereon; and this defendant denies that it

intends to continue to construct said railroad over said lands, either in defiance of the said laws and official requirements thereunder, or contrary to the policy of the complainant concerning the preservation, use and management of said reservation, or at all. But defendant admits that it intends to continue to operate its said railroad over and across the lands embraced within the limits of its said right of way, and it denies that said act, or any act of said defendant, or any act that it intends to do was, is or will be unauthorized or without authority from said complainant, or in defiance of law, or contrary to the policy of said *complaint* concerning the preservation, [77] use and management of said reservation. And said defendant denies that unless restrained therefrom by the injunctive process of this court it will carry out such, or any, threats, or that it has made any threats, save and except as hereinabove set forth, or that it will repeat from day to day, or from year to year, or at all, the wrongs and injuries to the said complainant described in said bill of complaint; and denies that it has at any time done any injury to the said complainant whatsoever. And this defendant denies that there has been, is or will be, any permanent or irreparable damage or injury, or any damage or injury whatsoever, to said complainant, or to the public interests to be affected by said railroad, or to the said reservation, or to the objects or purposes for which same was created resulting from any act of this defendant.

And this defendant denies that the alleged wrongful conduct of defendant and the course which it

threatens or intends to pursue, or either thereof, involves or will continue to involve long, or continuing or damaging trespasses, or any trespasses; and denies that it has been guilty of any wrongful conduct, or threatens or intends any wrongful course whatsoever; and further denies that the said complainant has no adequate remedy at law for the injuries, if any, done to it by any acts of defendants, or which this defendant threatens or intends to do; and it denies that said acts, or any thereof, constitute, or are, a public nuisance, or a nuisance at all, or injurious or unjust to the said complainant or constitute great, or any damage or injury to many or any of the citizens of the United States who live in proximity of the lands described in the said bill of complaint. And this defendant denies that it has ever at any time trespassed upon said lands or any thereof.

XIII. [78]

And this defendant not confessing or acknowledging all or any part of the matters and things in said bill of complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, save and except as it hath hereinbefore admitted, by way of plea unto so much of said bill as prays that this defendant be required and commanded to execute that certain stipulation a copy of which is attached to said bill as Exhibit "G" pleads and avers as follows:

(a) That this defendant entered upon the work of constructing its said railroad line over and across the lands described in said bill of complaint and along and upon that certain line indicated upon the

said map filed May 10, 1907, in the year 1908, and thereafter openly continued in said work until the entire completion of said railroad on or about the .... day of ....., 1909. That said defendant in the prosecution of said work expended large sums of money, to wit: more than $4,000,000.00, and that said complainant during all said times had full notice and knowledge that said defendant was so prosecuting said work and expending said money in the completion of said railroad. That during all of said times said complainant knew that said defendant had not signed said stipulation, but upon the contrary had refused to sign the same or to ratify or confirm the act of its said General Counsel George R. Peck in making said agreement, Exhibit "C"; for the reasons hereinbefore in this answer fully set forth. And said complainant well knew during all said times that said defendant claimed and was asserting full right and authority to so proceed with said work and construct said railroad under the rights, privileges, grants and authorities conferred upon it by said Act of Congress approved March 3, 1875, and its acceptance thereof and compliance with the provisions of said act and of the regulations of the Interior Department thereunder. [79] That during all of said times the said complainant, notwithstanding its said knowledge as aforesaid, failed and neglected to take any action whatsoever in the premises, but upon the contrary constantly and at all times acquiesced in the doing of said work at said cost by this defendant. That prior to the filing of said bill of complaint herein this defendant had fully completed

said work and the whole thereof. And this defendant now shows unto this Honorable Court that the said complainant is by said acts and acquiescence now estopped to demand that this defendant execute the said proposed stipulations and the said demand of said complainant that this defendant be now required to execute said stipulations is wholly without equity, is stale; and said complainant is now, and of right should be, barred by its said laches and acquiescence from now claiming or urging that this defendant should be required to sign said stipulations.

XIV.

And this defendant further shows unto your Honors that there is no equity in said bill of complaint, but that the said complainant has as to each and all of the matters and things therein set forth a full, adequate and speedy remedy at law.

WHEREFORE, This defendant prays that it be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

(Signatures of Solicitors for Defendant.)

(Filing Endorsement.) **[80]**

Replication.

(Caption.)

THIS REPLIANT, SAVING AND RESERVING TO ITSELF NOW AND AT ALL TIMES HEREAFTER, all and all manner of benefits and advantages of exception which may be had and taken to the manifold insufficiencies of the said answer of

the defendant, Chicago, Milwaukee & St. Paul Railway Company of Idaho, for replication thereto says: That it will aver, maintain, and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto, and that said answer of said defendant is uncertain, untrue and insufficient to be replied unto by repliant without this that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things the repliant is and will be ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

(U. S. Attorney's Signature.)

(Filing Endorsement.) **[81]**

Specifications of Objections to the Admission of Evidence.

(Caption.)

The defendant hereby specifies the following objections relied on to the admission of evidence:

1. The defendant objects to the admission of the matter set forth in the third paragraph of the stipulation of facts upon the ground that the same is immaterial.

2. Defendant objects to the admission of the matter set forth in the twelfth paragraph of the stipulation of facts upon the ground that the same is immaterial.

The foregoing objections are made under the fol-

lowing provision of the stipulation, viz.: That such stipulated facts are "subject to all objections which either party may make to the competency, materiality or relevancy thereof."

3. Defendant objects to the introduction of the letter of March 14, 1905, Plaintiff's Exhibit 1, for that the same is incompetent under the issues in this case.

(See page one of deposition taken April 12, 1911.)

4. Defendant objects to the testimony of the witness Dorr Skeels as to the quantity of timber cut and timber values, for the reason (1) that under the issues in this case such questions are irrelevant and immaterial; that under the pleadings no questions on quantities of timber are involved and (2) that under the admission in the pleadings and in the stipulation the Company had the right to take all of the timber on the 200 **[82]** foot right of way and also all other timber adjacent to the right of way which it needed for construction purposes.

(See deposition of Mr. Skeels taken April 12, 1911, pp. 7 and 8.)

5. Defendant objects to the statement by the witness, Dorr Skeels, as to the contents of an alleged agreement between the Company and the Government, for the reason that such agreement is in writing and the testimony was not the best evidence.

(See deposition of Mr. Skeels taken April 12, 1911, p. 9.)

6. Defendant objects to the following questions and to the answers thereto: "Q. Take the memo-

randa before you to refresh your memory, and read into the record the estimates made by you each succeeding day while you were in the employ of the Government," to which question defendant objected and objects for the following reasons:

The documents which the witness is asked to read into the record, he states, were not his original memoranda but compilations prepared by him from his original memoranda. They would therefore not be admissible in the first instant as books of original entry and if they themselves would not be admissible evidence, they cannot be gotten into the record by having the witness read them into the record under the form of refreshing his memory.

* * * * * * * * * * *

"Q. You may take up—you may go ahead now and take up each subdivision.

Same objection. These memoranda referred to being the same memoranda which were referred to when we interposed the former objection."

(See deposition of Mr. Skeels, taken April 12, 1911, pp. 11 and 12.)

7. Defendant objects to the admission in evidence of Exhibits 2 to 33, inclusive, for the reason that the same are not the original memoranda prepared by the witness, but are compilations subsequently prepared by him from such original memoranda.

(See deposition of Mr. Skeels taken April 12, '11, p. 13.) **[83]**

8. The defendant objects to the admission in evidence of exhibit 34, for the reason that the same is

not an original memoranda, but is a compilation subsequently prepared by the witness.

(See deposition of Mr. Skeels taken April 12, 1911, p. 13.)

9. Defendant objects to the following question propounded to the witness Skeels, namely: "Q. What amount did the Company pay for the timber in settlement," for the reason that the matter inquired concerning was incompetent, the prices referred to being paid in compromise settlement of trespass cases and therefore affording no connection whatsoever as to the market value of timber.

(See deposition of Mr. Skeels taken April 12, '11, p. 16.)

10. Defendant objects to the following question propounded to the witness, Mr. Skeels: "Q. You may state what amount, or what was the amount per thousand agreed upon in those settlements, what they ranged from," for the reason that such testimony is incompetent under the issues in this case and immaterial, that the price paid by a trespasser in settlement would be a payment in compromise and would afford no basis whatsoever upon which to determine the value of timber.

(See deposition of Mr. Skeels taken April 12, '11, p. 16.)

11. Defendant objects to the questions propounded to the witness Mr. Skeels as to the condition of the streams, the East Fork and the Little North Fork, with reference to their navigability for logs, for the reason that such testimony is irrelevant and immaterial under the issues of this case and not

competent to prove any such issues.

(See deposition of Mr. Skeels taken April 12, 1911, pp. 19 and 20.)

12. Defendant objects to the following question asked the witness Mr. Skeels: "Q. What means of transportation has the Government for this timber, if any," for the reason that it **[84]** is immaterial and incompetent under the issues in this case.

(Deposition of Mr. Skeels taken April 12, 1911, p. 23.)

13. Defendant moves to strike out the following statement made by the witness, Mr. Skeels, as not responsive to the question asked, namely: "During the summer of 1907, when the brush could have been burned without danger to the forest, they delayed in burning the brush and failed to dispose of it."

(See deposition of Mr. Skeels taken April 12, '11, p. 24.)

14. Defendant objects to the introduction of all testimony relative to fires for the reason that whatever damages resulted from fires would have to be recovered in an action at law and that a court of equity has no jurisdiction to pass upon such matter, and that such testimony is incompetent under the issues in this case.

(See deposition of Mr. Skeels taken April 12, 1911, p. 24.)

15. Defendant objects to the following interrogatory propounded on redirect examination to the witness, Mr. Skeels: "Q. Referring back to the question of the burned district, fires having originated on the right of way, do you know of your own knowl-

edge of any money having been paid in recognition of the liability of the company for the damage done," for the reason that the same was incompetent, first, because any payment of that kind would be in the nature of a compromise and therefore not admissible in evidence and second, that no case where a company paid for a trespass is involved in this action and an admission that they might be liable for a trespass in one case would not raise any presumption of liability in this action.

(See deposition of Mr. Skeels taken April 12, 1911, pp. 46 and 47.)

16. Defendant objects to the testimony of Mr. Skeels and statements made by him to Mr. Day with reference to the foregoing matter and for the same reasons.

(See deposition of Mr. Skeels, p. 47.) [85]

17. Defendant objects to the following question propounded to the witness, Mr. Rutledge, viz.: "Q. State whether or not it was generally understood among the agents and yourself that the provisions of the Peck agreement would be carried out," for the reason that the matter inquired concerning was immaterial and incompetent and proved no issue in this case.

18. Defendant objects to the interrogatories propounded to the witness, Mr. Rutledge, relative to the condition of the St. Joe River and its tributaries, for the reason that such matter is incompetent under the issues in this case, and that any damages, if any were done to the stream, would be properly the subject of an action at law and cannot be gone into

in this action in equity.

(See deposition of Mr. Rutledge, p. 55.)

19. Defendant objects to the interrogatories propounded to the witness, Mr. Hamilton, relative to the condition of the North Fork and other streams and their suitability for driving logs, for the reason that such matter is incompetent under the issues in this case and that such matter affords no ground for equitable relief.

(See deposition of Mr. Hamilton, p. 61.)

20. Defendant objects to all testimony concerning timber cut and the value thereof, concerning timber burnt and the values thereof, and concerning the obstructions to the river upon the ground that there is no equity in such matters, and that such evidence is incompetent and immaterial under the issues of this case. This objection to go to the testimony of all the complainant's witnesses upon these matters.

(See stipulation and deposition of Mr. Weigle, p. 69.)

21. Defendant objects to the statement by the witness, Mr. Seery, that Mr. Baker and Mr. Long had stated that the claim presented for seedlings was a valid claim, for the reason that the **[86]** parties were not shown to be authorized in any way to make such statement and that such matter is incompetent, irrelevant and immaterial.

(See deposition of Mr. Seery, p. 114.)

22. Defendant objects to and moves to strike out the statement by the witness Seery, that Mr. Baker and Mr. Long eventually agreed that it was a valid

claim and that they assumed responsibility for the timber that was destroyed and for the fire, for the reason that it was not shown that said parties had any authority to make such a statement that would be binding against the company, or to make any statement that would be valid or competent in this case.

(See deposition of Mr. Seery, p. 115.)

23. Defendant objects to and moves to strike out from the testimony of the witness, Mr. Seery, that the statements made by Messrs. Baker and Long were "with the knowledge and consent of Mr. Day," for the reason that the matter stated with reference to the consent of Mr. Day is a conclusion.

(See deposition of Mr. Seery, p. 115.)

24. Defendant objects to the testimony of Mr. Seery beginning with the statement shown on page 115 of Mr. Seery's deposition, viz.: "Mr. Day called on me frequently and called me up by phone," and extending to the bottom of page 115, for the reason that such statements were voluntary statements and not responsive to any question asked of the witness.

(See deposition of Mr. Seery, p. 115.)

25. Defendant objects to the following question and to the answer thereto, viz.: "Q. Go ahead and state what Mr. Long said to you about settling these damages," for the reason that what Mr. Long said is incompetent, irrelevant and immaterial. **[87]**

26. Defendant objects to and moves to strike out the following statement made by the witness, Mr. Seery: "He accepted these statements," as not be-

ing responsive to any question.

(See deposition of Mr. Seery, p. 116.)

27. Defendant objects to the following question asked of the witness, Mr. Seery: "Q. Now, Mr. Seery, did Mr. Long have knowledge of the estimates made on this map," for the reason that the same calls for a conclusion.

(See deposition of Mr. Seery, p. 116.)

28. Defendant objects to the following question propounded to the witness, Mr. Seery: "Q. And did he consent to the amounts of the estimate placed on the map by you and Mr. Baker," for the reason that Mr. Long has not been properly shown to be connected with the company, or his statements in any way admissible against the company, and for the further reason that the question calls for no fact, but the conclusion of a witness.

(See deposition of Mr. Seery, p. 116.)

29. Defendant moves to strike out from the testimony of Mr. Seery the following statement: "But that man Mr. Baker had an exact copy of it because he compared it and checked it over when they were finished," for the reason that said statement was not responsive to any question.

(See deposition of Mr. Seery, p. 117.)

30. Defendant objects to exhibit 35 attached to the deposition of Mr. Seery, for the reason that it is a self-serving statement, incompetent and not properly verified.

(See deposition of Mr. Seery, p. 117.)

31. Defendant objects to the following interrogatory propounded to the witness, Mr. Seery: "Q.

What was the amount of the damage agreed upon between you and Mr. Baker and Mr. Long," for the reason that Mr. Baker and Mr. Long are not shown to have any authority to make any agreement in that behalf.

(See deposition of Mr. Seery, p. 118.) **[88]**

32. Defendant moves to strike out the following statement made by the witness, Mr. Seery: "And I find since that it would cost more than that to reseed that area," for the reason that said statement was not responsive to the interrogatory asked.

(See deposition of Mr. Seery, p. 118.)

33. Defendant objects to the following interrogatory propounded to the witness, Mr. Seery: "Q. What was the total amount agreed between you and Mr. Long," for the reason that Mr. Long is not shown to have had any authority to make any agreement in that behalf.

(See deposition of Mr. Seery, p. 118.)

34. Defendant objects to and moves to strike out the following statement made by the witness, Mr. Seery, viz.: "And it was done with the fully understood idea that the railroad company was to utilize the timber just as fast as we had our estimate made of it," for the reason that it is not responsive to the interrogatory propounded, does not state any fact but the conclusion of the witness.

(See deposition of Mr. Seery, p. 119.)

35. Defendant objects to the following interrogatory propounded to the witness, Mr. Seery: "What did Mr. Long and Mr. Day say to you about these estimates and what the railroad would do with it,"

for the reason that it is not shown that Mr. Long and Mr. Day had any authority to bind the company by any statements.

(See deposition of Mr. Seery, p. 119.)

36. Defendant objects to the following interrogatory propounded to the witness, Mr. Seery: "Q. Did the railroad state to you—or did they state to you that the railroad wanted to use this timber as fast as you made the estimates," for the reason that it is not shown that Messrs. Long and Day had any [89] authority to bind the company by any statements.

(See deposition of Mr. Seery, pp. 119–120.)

37. Defendant objects to the following interrogatory propounded to the witness, Mr. Seery: "Q. And did they approve of the maps in their present condition," for the reason that the question did not call for any fact, but for the conclusion of the witness.

(See deposition of Mr. Seery p. 120.)

38. Defendant objects to the following, interrogatory propounded to the witness, Mr. Seery: "Q. What was the object in signing these maps," for the reason that it called for an opinion only on the part of the witness.

(See deposition of Mr. Seery, p. 120.)

39. Defendant objects to the exhibits 36, 37, 38 and 39 offered in connection with the testimony of Mr. Seery, for the reason that the same are incompetent, not properly identified or shown to be connected with the company.

(See deposition of Mr. Seery, pp. 120–1.)

40. Defendant objects to the following interrogatory propounded to the witness, Mr. Seery: "Q. What did you estimate the cost to be to clear the stream of obstructions and make it navigable for logs," for the reason that the witness is not shown to be competent to testify upon that point.

(See deposition of Mr. Seery, p. 125.)

41. Defendant objects to the following interrogatory propounded to the witness F. I. Rockwell, viz.: "Q. What was this value," for the reason that the witness had not been shown competent to testify as to values.

(See deposition of Mr. Rockwell taken May 3, 1911, p. 8.)

42. Defendant objects to the following interrogatory propounded to the witness F. I. Rockwell, viz: [90] Q. "What was that value," for the reason that the competency of the witness to testify as to values had not been shown.

(See deposition of Mr. Rockwell, pp. 9 and 10.)

43. Defendant objects to the following interrogatory propounded to the witness, Mr. Rockwell, viz.: "Q. Do you consider the means which might be used in restoring this area, or this legal subdivision to its condition before the fire occurred," for the reason that the matter inquired concerning was immaterial, irrelevant and not competent to prove any of the issues in this case.

(See deposition of Mr. Rockwell, p. 10.)

44. Defendant objects to the following interrogatories propounded to the witness, Mr. Rockwell: "Q. What means did you determine to be the most

practicable," also to the following interrogatory: "Did you determine what it would cost to replant that area with the species at the time the fire occurred," for the reason that such matters were immaterial, irrelevant and not competent to prove any of the issues in this case.

(See deposition of Mr. Rockwell, p. 10.)

45. Defendant objects to the following interrogatory propounded to the witness, Mr. Rockwell: "Q. And what was that cost," for the reason that such matter is incompetent, immaterial and irrelevant under the issues in this case and was not a proper method of arriving at the value of the timber.

(See deposition of Mr. Rockwell, p. 11.)

46. Defendant objects to the following interrogatory propounded to the witness, Mr. Rockwell: "Q. Taking the eight acres upon which the stand at an average age of fifteen years, what would be the total cost of planting that area," with the species that you found had been destroyed, and the caring for the growth until it reached the age at which it was destroyed," [91] for the reason that such matter was incompetent, immaterial and irrelevant under the issues in this case and was not a proper method to arrive at the value of the timber. (See deposition of Mr. Rockwell, p. 11.)

47. Defendant objects to the following interrogatory propounded to the witness, Mr. Rockwell:

"Q. And on the area consisting of ten acres, on which the average age was 90 years, what would be the total cost to the Government of planting that area and caring for it until it reached the age of 90 years,"

for the reason that such matter is incompetent, immaterial and irrelevant under the issues of this case, and that the method proposed is not a proper method to arrive at the value of the timber, and upon the further ground that the qualifications of the witness to answer such question are not shown.

(See deposition of Mr. Rockwell, p. 11.)

48. Defendant objects to the following interrogatory propounded to the witness, Mr. Rockwell: "Q. In arriving at these conclusions, what did you consider the cost per acre for the care of the trees," for the same reason as stated in the last above objection.

(See deposition of Mr. Rockwell, p. 11.)

49. Defendant objects to the admission in evidence of Government's Exhibit 1–a attached to the deposition of Mr. Rockwell, so far as it purports to show values, for the reason that they are based on an incorrect method of arriving at the value of the timber destroyed and for the further reason that the qualifications of the witness to testify as to the value has not been shown.

(See deposition of Mr. Rockwell, p. 15.)

50. Defendant objects to the introduction in evidence of Government's Exhibit 2–a, offered in connection with the deposition of Mr. Rockwell, for the reason that so far as it [92] purports to show the quantities of timber in the burnt areas, it is a duplicate of Government's Exhibit 1–a, and in so far as it purports to show the cost of restocking and the value of the timber arrived at in that manner, it is immaterial, irrelevant and incompetent, that not be-

ing a proper method of getting at the market value of the young timber destroyed, and upon the further ground that the qualifications of the witness to testify as to the cost have not been shown.

(See deposition of Mr. Rockwell, pp.17–18.)

51. Defendant objects to Government's Exhibit 3–a, offered in evidence in connection with the deposition of Mr. Rockwell, upon the same grounds that it objected to the offer of Government's Exhibit 1–a.

(See deposition of Mr. Rockwell, p. 10.)

52. Defendant objects to the following interrogatory propounded to the witness, Mr. Rockwell, viz.: "Q. During the period of your examination of these fires which occurred along the Milwaukee right of way, in addition to the fire known as the 'loop' fire, did you determine what it would cost to restore the area to condition before the fire by the most practicable method of re-stocking," upon the ground that it is immaterial and the qualifications of the witness to testify upon the values have not been shown.

(See deposition of Mr. Rockwell, p. 20.)

53. Defendant objects to the introduction in evidence of Government's Exhibit 4–a, offered in connection with Mr. Rockwell's deposition for the same reasons that it objected to the introduction of Government's Exhibit 2–a; it further objects to the admission of all of said exhibits upon the ground that they are not competent under the issues in this case, for the reason that the complainant's remedy, if any, is at law, and not in equity.

54. Defendant moves to strike all of the testimony of the witness, Mr. Rockwell, for the reasons assigned

in the various [93] objections interposed, and for the further reason that it appears that in his estimate of the cost he has allowed an unwarrantable rate of interest and in his estimates, based on the value of timber at maturity, there is no different allowance for insurance or probability that the timber would have been destroyed from other causes, and also upon the ground that the testimony is not competent as furnishing no basis for equitable relief.

(See deposition of Mr. Rockwell, p. 30.)

55. Defendant objects to and moves to strike the testimony of Wm. M. Morris in the same particulars and upon the same grounds as the objections and motion to strike the testimony of the witness, Mr. Rockwell, are based.

(See deposition of Mr. Morris, p. 32.)

56. Defendant objects to the following interrogatory propounded to the witness, Mr. Morris: "Q. What, in your judgment, is the present value of green timber in this locality—per thousand feet—of the species that were standing there at the time of the fire," for the following reasons, viz.: (1), that it appears that the witness was not familiar with the values of 1907 and 1908 at the time when the alleged injuries occurred and is therefore not competent to testify, and (2), that the present market value of these timbers is not material or relevant, as the measure of damages will be the market value at the time the injuries occurred.

(See deposition of Mr. Morris, p. 23–24.)

57. Defendant objects to the following interrogatory propounded to the witness, Mr. Morris:

"Q. Have you made any sales, or have any sales been made to your knowledge, or areas similarly situated and upon which the same species were standing since you have been employed on the Coeur d'Alene Forest," for the reason that the matter inquired concerning is immaterial since the value could not be shown by sales two or three years subsequent to the injuries complained of.

(See deposition of Mr. Morris, p. 34.) **[94]**

58. Defendant objects to the following interrogatory propounded to the witness, E. C. Clifford, viz.: "What in your judgment would it cost per acre to plant an area in that locality with a mixed stand of white pine, red fir, lodge pole pine and larch," for the reason that such matter is incompetent under the issues in this case, is immaterial and irrelevant.

(See deposition of Mr. Clifford, p. 38.)

59. Defendant objects to the following interrogatory propounded to the witness, Mr. Clifford: "Q. About how many trees per acre would you have to use in order to fully re-stock the area," for the reasons that the matter inquired concerning is incompetent, immaterial and irrelevant under the issues in this case.

(See deposition of Mr. Clifford, p. 39.)

60. Defendant objects to the following interrogatory propounded to the witness, Mr. Clifford: "Q. How much of an expenditure per acre would it require to properly care for and protect the seedlings after they were planted per year," for the reasons that the matter inquired concerning is incompetent, irrelevant and immaterial under the issues in this

case, and for the further reason that the competency of the witness to testify upon that point has not been shown.

(See deposition of Mr. Clifford, p. 39.)

61. Defendant objects to the following interrogatory propounded to the witness, F. A. Silcox, viz.: "Q. Do you know, Mr. Silcox, how much per acre in this district the Government is now spending in connection with this timber sale work and in connection with the fire protection," for the reason that the matter inquired concerning is immaterial.

(See deposition of Mr. Silcox taken May 3, 1911, p. 40.)

62. Defendant objects to the following interrogatory propounded to the witness, Mr. Silcox. [95] "Q. To what extent, in your judgment, Mr. Silcox, would you have to increase the expenditure per acre covering timber sale and fire protection work, in order to eliminate the fire danger," for the reason that the matter inquired concerning is incompetent, immaterial and irrelevant in this case.

(See deposition of Mr. Silcox taken May 3, 1911, pp. 40–41.)

63. Defendant objects to the following interrogatory propounded to the witness, Mr. Silcox, viz.: "Q. With additional protection I understand in your judgment the fire danger would be eliminated," for the reason that such matter is incompetent, immaterial and irrelevant in this case.

(See deposition of Mr. Silcox taken May 3, 1911, p. 41.)

64. Defendant moves to strike out the testimony

of the witness Mr. Silcox, upon the ground that it is incompetent, immaterial and irrelevant under the issues in this case.

(See deposition of Mr. Silcox taken May 3, 1911, p. 11.)

65. Defendant moves to strike out the following statement made by the witness, Mr. Skeels, viz.: "A. These acres that were burned over were acres in that heavy stand of timber. The fires simply burnt in different places along the right of way through that heavy stand of timber, burning a little area here and there. The timber was not scattered itself, but simply the small fires were scattered and it could have been logged at a profit," for the reason that such matter was not responsive to any interrogatory propounded to the witness.

(See deposition of Mr. Skeels, taken March 27, 1912, p. 2.)

66. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. Will you please describe that situation, whether or not the timber was scattered over the areas and how the timber did lie on the land," for the reason that the matter inquired concerning was not proper rebuttal. **[96]**

(See deposition of Mr. Skeels taken March 27, 1912, p. 2.)

67. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels:

"Q. Situated as it was at that time, did the timber on these burnt acres, or did it not, comprise a part of

a good logging chance," for the reason that it is not proper rebuttal.

(See deposition of Mr. Skeels taken March 27, 1912, p. 3.)

68. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. I call your attention to the following testimony given by Mr. Douglas and found on page 16 of the testimony taken at Spokane: 'Q. And during those years, what was the market value of stumpage on white fir, red fir, tamarack and spruce, what you usually call mixed timber (objection omitted). A. If it was simply mixed timber, then it would not be of any value. The people that I was with would not buy it. If there was sufficient white pine mixed with it, they would probably give 50 cents a thousand.' Q. Is that correct in your judgment," for the reason that it is not proper rebuttal and is incompetent as asking this witness to pass upon the sufficiency of an answer of another witness.

(See deposition of Mr. Skeels taken March 27, 1912, p. 3.)

69. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. State in what manner it is incorrect," for the reason that it is not proper rebuttal and is incompetent as asking this witness to pass upon the sufficiency of an answer of another witness.

(See deposition of Mr. Skeels taken March 27, 1912, p. 3.)

70. Defendant moves to strike out the answer of the witness, Mr. Skeels, to the foregoing inter-

rogatory, which answer is as follows: [97] "The mixed timber of the species named and of the quantity which was cut and burned in this district had a sale value at that time of about $4.00 per thousand. This timber that was cut and burned in this case was of excellent quality for mining timbers, square timbers and ties and that class of material and took a very high value," for the reason that such matter was not responsive to the interrogatory propounded and upon the further ground that it is not proper rebuttal testimony.

71. Defendant objects to the following interrogatory propounded to Mr. Skeels: "Q. How did the logging chances at that place compare with the logging chances of the timber which was cut and removed from the right of way of the railroad between Avery and the summit and the adjoining strip to the right of way," for the reason that it is not proper rebuttal.

(See deposition of Mr. Skeels taken March 27, 1912, pp. 4 and 5.)

72. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. How did it compare as a logging chance with the timber on these burnt areas involved in this suit," for the reason that it is not proper rebuttal.

(See deposition of Mr. Skeels, taken March 27, 1912, p. 5.)

73. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. Please state whether the cost of logging differs in different locations," for the reason that it is not

proper rebuttal and is immaterial.

(See deposition of Mr. Skeels, taken March 27, 1912, p. 5.)

74. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Is it possible to get the cost of logging a body of timber without having first examined the ground with respect to the size and quantity of timber and the physical characteristics of the locality," for the reason that it is incompetent and not proper rebuttal. [98]

(See deposition of Mr. Skeels, taken March 27, 1912, p. 5.)

75. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels, viz.: "Q. Upon what do you base your answer," upon the ground that it is incompetent and not proper rebuttal.

(See deposition of Mr. Skeels, taken March 27, 1912, p. 5.)

76. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. Please state whether, in your judgment, the logging on that area was done in an economical manner," upon the ground that the matter is not rebuttal and is incompetent.

(See deposition of Mr. Skeels taken March 27, 1912, p. 7.)

77. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "You may state in what way the expense was increased over what it should have been," for the

reason that it is not rebuttal and is incompetent.

(See deposition of Mr. Skeels taken March 27, 1912, p. 7.)

78. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Would the cost of that operation be a fair basis on which to estimate the cost of logging the timber involved in this controversy," upon the ground that it is incompetent and not rebuttal.

(See deposition of Mr. Skeels taken March 27, 1912, p. 8.)

80. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. I call your attention, Mr. Skeels, to the following testimony given by Mr. Douglas and found on page 41 of the testimony taken at Spokane: 'Q. (By Mr. Henderson.) Before the [99] railroad was constructed there, Mr. Douglas, it would have been a simple matter to have logged the trees growing on the right of way of the railroad? A. The railroad would not have interfered with it, but it would not have been very simple to have gotten them down these side hills a mile or two to the creeks.' Please state, Mr. Skeels, how far it would have been necessary to have hauled the logs from the right of way and adjoining strip to the creeks." upon the ground that the matter inquired concerning was not proper rebuttal and is incompetent and immaterial.

(See deposition of Mr. Skeels taken March 27, 1912, p. 9.)

81. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels, viz.:

"Q. Would that be true also of the timber burnt in these various areas involved in this suit," upon the ground that the same is not proper rebuttal and is incompetent and immaterial.

(See deposition of Mr. Skeels taken March 27, 1912, p. 9.)

82. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. I call your attention to the following testimony given by Mr. Douglas and found on pages 25 and 26 of the testimony taken at Spokane: 'Q. When did the lumber market break, was there a break in the lumber market after that? A. Yes, I think in the early part of 1908. Q. And what is the fact as to the condition of the lumber market since then? A. Well, I am not so familiar with the lumber market; they tell me it is very poor. Q. Now, what is the fact with respect to the market for stumpage? A. The market for stumpage is very slow. You can hardly sell any at all unless it is something very handy. Q. And that condition has existed since when, Mr. Douglas? A. Since 1908.' Please state, Mr. Skeels, whether since 1908 there has been any demand for Forest service timber in this region," for the reason that the said matter is not proper rebuttal and is incompetent and immaterial.

(See deposition of Mr. Skeels taken March 27, 1912, pp. 9–10.)

83. Defendant objects to the following interrogatory propounded to the witness, Mr. Skeels: "Q. Please describe what the conditions have been along that line," for the reason that the matter in-

quired concerning is not proper rebuttal and is incompetent and immaterial. **[100]**

(See deposition of Mr. Skeels taken March 27, 1912, p. 10.)

84. Defendant moves to strike from the answer to the above interrogatory the following portion thereof, to wit: "If that timber was green we could sell the whole watershed for not less than $5.00 a thousand," for the reason that it is a voluntary statement and not responsive.

(See deposition of Mr. Skeels, taken March 27, 1912, p. 10.)

85. Defendant objects to the following question propounded to the witness, Mr. Skeels, upon redirect examination: "Q. How did the timber there compare with the logging chance of the timber involved in this suit," for the reason that it is not proper redirect, is incompetent and is immaterial.

(See deposition of Mr. Skeels, taken March 27, 1912, p. 12.)

86. Defendant objects to the following interrogatory propounded to the witness, Geo. A. Hamilton: "Q. Please state whether in your judgment it is possible to estimate the cost of a logging operation on a given area without having first gone over the ground carefully to observe topographical features and the situation of the timber with respect to the method by which it could be removed and carried to market," for the reason that it is not proper rebuttal and is not a proper subject for expert testimony. It calls for an opinion and is not competent.

(See deposition of Mr. Hamilton taken March 27, 1912, p. 14.)

87. Defendant objects to the following interrogatory propounded to the witness, Mr. Hamilton: "Q. Please state whether or not in logging the timber which formerly grew upon the right of way of the railroad company and the adjacent ground to the right of way between Avery and the Summit, it would be necessary to expend in hauling the timber to the stream as great a sum as $3.00 per thousand," upon the ground that the same is not proper rebuttal testimony and is incompetent, also upon the further ground that the question is not confined to any particular location and therefore lays no proper foundation for an opinion as to any particular [101] part.

(See deposition of Mr. Hamilton taken March 27, 1912, p. 15.)

88. Defendant objects to the following interrogatory propounded to the witness, Mr. Hamilton: "Q. Would an expenditure of this amount be necessary in hauling the timber to the stream from any portion of the right of way, or of a strip not exceeding 300 feet on each side of the right of way between Avery and Summit," upon the ground that it is incompetent and not rebuttal.

(See deposition of Mr. Hamilton taken March 27, 1912, p. 15.)

89. Defendant objects to the following interrogatory propounded to the witness, Mr. Hamilton: "Q. State if you know the average distance this timber would have to be skidded to reach the stream,"

upon the ground that it is incompetent and not proper rebuttal, being a part of the Government's case in chief.

90. Defendant objects to the following question propounded to the witness, Charles H. Gregory: "Q. How does the logging chance on that area compare with the logging chance along the right of way of the defendant corporation between Avery and St. Paul Pass Tunnel," upon the ground that it is incompetent and not rebuttal, that it is too vague and indefinite, that including an area from Avery to St. Paul Pass Tunnel the logging chance in various portions of that area is necessarily dependent upon local conditions and cannot be lumped together for the purpose of comparison.

(See deposition of Mr. Gregory taken March 27, 1912, p. 17.)

91. Defendant objects to the following interrogatory propounded to the witness, Mr. Gregory: "Q. Would the cost of logging the timber which was cut from that Clear Creek sale area be a fair basis upon which to arrive at an estimate of the cost of logging timber from any portion of the right of way or adjacent ground between Avery and Summit," for the reason that it is incompetent and not rebuttal, too vague and indefinite and is not a proper subject of expert testimony, that it calls for a matter of opinion and not of facts. [102]

(See deposition of Mr. Gregory taken March 27, 1912, pp. 17–18.)

92. Defendant objects to the following interrogatory propounded to the witness, Mr. Gregory:

"Q. Is it possible, Mr. Gregory, to arrive at a correct estimate of the cost of logging any given area without first going over the ground carefully and noting the different topographical features and the situation of the timber with respect to streams or other avenues by which it could be marketed," upon the ground that it asks for an opinion upon a subject not proper for expert testimony and is not rebuttal.

(See deposition of Mr. Gregory taken March 27, 1912, p. 18.)

93. Defendant objects to the following interrogatory propounded to the witness, Mr. Gregory: "Q. Can you state whether the question of timber within a logging chance has any bearing upon the cost per thousand of the logging of the timber—that is, would the cost per thousand for the logging be different in a small sized logging chance than that of a large sized one," for the reason that it is not rebuttal and asks for an opinion upon a subject not proper for expert testimony.

(See deposition of Mr. Gregory taken March 27, 1912, p. 18.)

94. Defendant objects to the following interrogatory propounded to the witness, Mr. Gregory: "Q. Would the cost per thousand for the logging an amount of timber approximately four million and a half afford any basis for arriving at the cost of logging timber in one drainage to the extent of fifty or seventy-five million feet," upon the ground that it is incompetent and not rebuttal.

(See deposition of Mr. Gregory, taken March 27, 1912, p. 19.)

95. Defendant objects to the following interrogatory propounded to the witness Jas. W. Girard: "Q. How does the logging chance on that area compare with the loggi[illegible]nce on the right of way and the adjacent land [illegible]the mouth of the East Fork to the Tunnel—St. Paul Pass Tunnel," upon the ground that it is incompetent and not proper rebuttal testimony and the witness was not shown competent to testify with respect to such matter.

(See deposition of Mr. Girard, p. 21.) [103]

96. Defendant objects to the following interrogatory propounded to the witness, Mr. Girard: "Q. In logging the timber which formerly stood upon the right of way of the defendant corporation between Avery and the Summit and upon a strip upon each side of the right of way not exceeding 300 feet on each side, would it be necessary at any point, in order to take the logs to the stream below the right of way, to haul them a distance of from one to two miles," for the reason that it is not proper rebuttal and incompetent.

(See deposition of Mr. Gregory, p. 21–22.)

97. Defendant objects to the following interrogatory propounded to the witness, Mr. Girard: "Q. How would the timber be put in the River," for the reason that the same is not proper rebuttal.

(See deposition of Mr. Girard, p. 22.)

98. Defendant objects to the following interrogatory propounded to the witness, Mr. Girard: "Q. In arriving at the cost of logging a given area what facts

must be taken into consideration," for the reason that it is not rebuttal, is incompetent and the witness has not shown he is competent to testify with respect thereto.

(See deposition of Mr. Gregory, p. 22.)

99. Defendant objects to the following interrogatory asked of the witness, Mr. Girard: "Q. Would it be possible to arrive at a correct estimate of the cost of logging a given area without first making a careful examination," for the reason that the same is not proper rebuttal and is not a proper subject of opinion evidence.

(See deposition of Mr. Girard, p. 22.)

100. Defendant objects to the following question propounded to the witness, Mr. Girard: "Q. Please state whether, in logging timber growing on the right of way and the adjacent strip just referred to between Avery and the Summit, it would be necessary at any point to expend the sum of $3.00 per thousand for hauling the timber to the creek," [104] for the reason that it is not proper rebuttal and no qualification of the witness to testify is shown.

(See deposition of Mr. Girard, p. 22–3.)

101. Defendant moved to strike from the deposition of Mr. James B. Adams the following matter, viz.: "It is not my understanding now, and has never been my understanding, that those circumstances would have any bearing whatever on the question of requiring stipulation or executing stipulation. Of course, I do not know the law in this matter and I am stating my understanding of the opinions we have had from the law officers," for the reason that such

matter was not responsive to the question asked the witness and is immaterial.

(See deposition of Mr. Adams, p. 8.)

102. Defendant objects to the following interrogatory propounded to the witness, Mr. Adams: "Q. Please state whether or not before or at the time Mr. Peck signed the agreement known as plaintiff's Exhibit C on May 10, 1907, you had ever considered the question of the authority of a railway company under the act of March 3, 1875, or any other act, to secure a right of way on lands temporarily withdrawn for inclusion in a National Forest, with reference to securing approval of the Forestry Service and filing with the Forestry Service stipulation for the protection of the lands," upon the ground that the question calls for a conclusion of law and not a fact, and that it is incompetent and immaterial.

(See deposition of Mr. Adams, p. 8–9.)

103. Defendant objects to the following interrogatory propounded to the witness Philip P. Wells: "Q. Mr. Wells, Exhibit C, referred to in this testimony requires the defendant railroad company to file stipulations like those which the Montana Company had filed in the matter of its right of way across the Helena National Forest. Will you please state for what purpose reference in Exhibit C was made to the Helena stipulations. I mean by that, whether or not it was for the purpose of designating the substance of the stipulations to be signed by the Company for its right of way in the Coeur d'Alene National Forest, or whether reference in Exhibit C to the Helena stipulations had any connection with the

relative dates upon which the railroad had filed its maps in the Local Land Office and the dates the president had created the respective National Forests," [105] for the reason that it does not appear that the witness prepared or procured the signing of Exhibit C by Mr. Peck.

(See deposition of Mr. Wells, pp. 34–5.)

104. Defendant objects to the following interrogatory propounded to the witness, Mr. Wells: "Q. Please state whether or not prior to May 10, 1907, you had advised the Forester with reference to the right of the Government to require a railway company to execute and file stipulations for right of way across lands in temporary reservations," for the reason that it is immaterial and irrelevant in this action.

(See deposition of Mr. *Q*uells, p. 35.)

105. Defendant moves to strike from the deposition of Mr. Overton Price the following matter, to wit: "And to have done so would have been entirely inconsistent with the policy of the Forest Service at that time," for the reason that it is not responsive to any interrogatory propounded.

(See deposition of Mr. Price, p. 41.)

106. Defendant objects to the following interrogatory propounded to the witness, Mr. Price: "Q. I will ask you, Mr. Price, if after May 10, 1907, or prior thereto, or at that time you had ever considered the question of the right of the Forest Service to require a railway company to execute and file a stipulation for the preservation and protection of lands of the United States, which were in a state of tem-

porary reservation," for the reason that it is immaterial.

(See deposition of Mr. Price, p. 41.)

107. Defendant objects to the following interrogatory propounded to the witness, Mr. Price: "Q. Will you please state, if you remember, what the attitude of the Forest Service was in 1907, as to the right to require a Railway Company to execute stipulations for right of way across lands in temporary reservation for forest purposes," for the reason that it is immaterial, a matter of opinion with the witness and calls for hearsay testimony.

(See deposition of Mr. Price, p. 42.) [106]

108. Defendant objects to the following interrogatory propounded to the witness, F. A. Silcox, viz.: "Q. I ask you, Mr. Silcox, to state the facts as to the demand for Forest Service stumpage subsequent to the year 1907," for the reason that it is not proper rebuttal.

(See deposition of Mr. Silcox, taken April 4, 1912, p. 3.)

109. Defendant objects to the following interrogatory propounded to the witness, Mr. Silcox: "Q. State the fact of the demand for stumpage since the forest fires of 1910," upon the ground that it is not proper rebuttal.

(See deposition of Mr. Silcox, taken April 4, 1912, p. 4.)

110. Defendant objects to the following interrogatory propounded to the witness, Mr. Silcox: "Q. What are the facts as to the sale price of forest Ser-

vice stumpage," upon the ground that it is not proper rebuttal and is incompetent.

(See deposition of Mr. Silcox, p. 4.)

111. Defendant objects to the following interrogatory propounded to the witness, Mr. Silcox: "Q. What are the facts as to the sale price of Forest Service stumpage in the St. Joe drainage since the forest fires of 1910 and during the year 1911," for the reason that it is incompetent and not proper rebuttal.

(See deposition of Mr. Silcox, taken April 4, 1912, p. 4–5.)

112. Defendant objects to the introduction in evidence of the contract between the United States and the McGoldrick Lumber Company marked "Plaintiff's Exhibit 'A' " in connection with Mr. Silcox's testimony, upon the ground that it is not proper rebuttal and not competent under the issues in this case.

(See deposition of Mr. Silcox, p. 5.)

113. Defendant objects to the contract between the United States and the Milwaukee Lumber Company, offered in evidence [**107**] in connection with Mr. Silcox's testimony as Exhibit "B," for the reason that it is incompetent and not proper rebuttal.

114. Defendant moves to strike out the testimony of the witness Mr. Silcox with respect to this contract, "Plaintiff's Exhibit "B," in connection with Mr. Silcox's testimony, upon the ground that it is not proper rebuttal and is incompetent to prove any issues in this case.

(See deposition of Mr. Silcox, pp. 5–6.)

115. Defendant objects to the following interrog-

atory propounded to the witness, Mr. Silcox: "Q. Mr. Silcox, I call your attention to the testimony of Mr. Douglas, taken on behalf of the Company at Spokane on October 11, page 117 of the transcript, where he was asked by Mr. Dudley the question: 'Is it a fact as to whether or not the Lake Coeur d'Alene basin, or Lake Coeur d'Alene country determined the value of the stumpage for the St. Joe or Coeur d'Alene—as to whether or not that was the market? A. Yes, everything was delivered in Coeur d'Alene Lake, that was the way it was usually bought.' I will ask you whether the price of logs in Coeur d'Alene Lake was a proper criterion for the price of stumpage for standing timber in the National Forests of the St. Joe drainage," for the reason (1) that it is not proper rebuttal, the plaintiff having shown by its own witnesses introduced in the case in chief, that the Coeur d'Alene market was the market that determined the market price of the timber in the St. Joe basin; (2) that the question is not competent, as it calls for an opinion of the witness and not for any facts; and (3) that the competency of the witness on this particular matter has not been shown.

(See deposition of Mr. Silcox taken April 4, 1912, p. 6.)

116. Defendant objects to the following interrogatory propounded to the witness, Mr. Silcox: "Q. Will you state your reasons," for the reason that it is not proper rebuttal, is an attempt to contradict testimony introduced by the plaintiff in its case in chief and the matter is not a proper subject of expert testimony, [108] nor has the witness been

shown competent to testify upon the subject.

(See deposition of Mr. Silcox, taken April 4, 1912, p. 7.)

117. Defendant objects to the following interrogatory propounded to the witness, Mr. Silcox: "Q. Will you state whether the prices paid for timbered lands in the St. Joe, or its vicinity, or in the vicinity of Coeur d'Alene Lake, would be a proper criterion to determine the value of standing timber on forest service lands," for the reason that it is not proper rebuttal, is not a proper subject of expert testimony and the witness is not shown to be qualified to testify upon the subject.

(See deposition of Mr. Silcox of April 4, 1912, p. 7.)

(Signature of Solicitor for Defendant.)

(Filing Endorsement.) [109]

Decision.

(Caption.)

Apr. 1, 1913.

C. H. LINGENFELTER, U. S. Attorney, W. C. HENDERSON and H. H. CLARKE, Solicitors for Complainant.

F. M. DUDLEY and H. H. FIELD, Solicitors for Defendant.

DIETRICH, District Judge:

This is a suit in equity exhibiting a controversy between the United States and the Chicago, Milwaukee & St. Paul Railway Company of Idaho, primarily involving the question of the conditions un-

der which a railroad company may acquire a right of way through lands embraced in a national forest. The right of way here in controversy is that claimed by the defendant through the Coeur d'Alene reserve, in the northern part of Idaho. In chronological order, the salient facts may be stated about as follows:

"On March 21, 1905, the Commissioner of the General Land Office, by direction of the Secretary of the Interior, acting upon the request of the Secretary of Agriculture, temporarily withdrew from all disposal, except under the mineral laws, all of the lands which at a later date became the Coeur d'Alene National Forest.

In January, 1906, the defendant company was organized for the purpose of constructing a railway, which, in part, was to extend across the lands so withdrawn.

On February 17, 1906, the articles of incorporation and proofs of organization of the defendant company were accepted for filing, and were filed by the Secretary of the Interior, and later in the same year, on November 16th, amendments thereto were accepted and filed.

During the period from June 3d to October 13th, 1906, the defendant's line of road was surveyed and staked upon the ground.

On October 20, 1906, the route as thus selected was [110] adopted by resolution of the defendant's board of directors.

On October 23, 1906, maps of the defendant's

road were filed in the local Land Office at Coeur d'Alene, Idaho, as required by the Act of March 3, 1875, and the departmental rules, and upon the same day these maps were transmitted by the Register to the General Land Office.

On November 6, 1906, the Coeur d'Alene National Forest was created by proclamation of the President.

On January 2, 1907, in response to an inquiry, the chief law officer of the Forest Service wrote a letter to counsel for the defendant, advising him of the practice in cases where applications were made for railroad rights of way in the national forests, from which it appeared that it was customary for the Secretary of the Interior to call upon the Secretary of Agriculture to consider right of way applications over lands embraced within temporary withdrawals, and it was the view of the Department that, if the reserve was actually created before the approval of the maps, the Secretary of Agriculture would have the right to demand from the railroad company, as a condition precedent to approval, a stipulation containing certain provisions for the protection of the forests. It was further explained in the letter that the applications of the defendant had not been approved, and that therefore the Forestry Service would be obliged to require such a stipulation.

On March 18, 1907, the defendant, after making certain additional surveys, by resolution adopted a route different in some particulars from that shown upon its original maps.

On March 20, 1907, maps exhibiting the newly

adopted route were filed with the Register of the land office at Coeur d'Alene, and forwarded to the General Land Office.

On May 6, 1907, still another resolution was adopted making further changes in the route.

On May 10, 1907, maps exhibiting this new route were filed with the Register of the local land office, and transmitted to the General Land Office. In this connection it may be added that none of these maps has ever been approved by the Secretary of Agriculture or the Secretary of the Interior.

On June 25, 1907, the Register of the local land office at Coeur d'Alene, acting under instructions from the Commissioner of the General Land Office, returned to the Railway Company its maps filed on October 23, 1906, and on March 20, 1907, with the explanation that it was understood by the Department that the maps of May 10, 1907, were intended to supersede the two earlier filings.

On May 10, 1907, one George R. Peck signed and filed with the United States Department of Agriculture, Forest Service, a writing which, in a sense, is the foundation of this suit, the same being as follows:

"UNITED STATES DEPARTMENT OF AGRICULTURE.
FOREST SERVICE.

Chicago, Milwaukee & St. Paul Railway Company of Idaho,—railroad (Interior)—Coeur d'Alene National Forest, Idaho.

Whereas the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permis-

sion from the Forest Service to begin construction of the company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within [111] the Helena National Forest, Montana.

Date May 10, 1907.

(Signed) GEORGE R. PECK,
General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho."

On the same day, that is, on May 10, 1907, the following notation was endorsed upon this writing by the Acting Forester: "Approved and advance permission given to construct, subject to ratification hereof by the company. Date May 10, 1907." And it is to be added that thereafter, until October, 1907, at least, the Government officers in good faith acted upon the assumption that the conditions of the writing were satisfactory to the defendant company.

On or about July 10, 1907, the defendant commenced the construction of that part of its road extending through the Coeur d'Alene National Forest, and completed the same on or about July 31, 1909.

On or about October 24, 1907, a form of stipulation or contract, represented to be in accordance with the terms of the Peck agreement, was by the Forestry Service presented to the defendant for execution.

On or about November 15, 1907, the defendant informed the forest supervisor that it would not sign such stipulation, but would await the outcome of certain negotiations which were pending at Washington with the officers of the Interior Department and the Department of Agriculture; the record does not disclose what reasons were assigned by the defendant for its declination to sign the proffered stipulation, but

On or about December 2, 1907, Peck, acting for the defendant, personally advised the Forester at Washington that he, Peck, was not authorized to make any different agreement in the case of the Coeur d'Alene National Forest than that which had been made for a right of way through the Yakima National Forest, and requested that the work of construction which was then being prosecuted should not be interrupted until the matter could be finally adjusted. Complying with this request, proper instructions were given to the subordinate officers of the Forestry Service to let the work proceed, and generally it may be said that while the officers of the Government and its employees from time to time manifested their dissatisfaction with the attitude and conduct of the defendant, it was permitted to prosecute the work of construction to completion without molestation.

On October 29, 1908, the Secretary of the Interior, after having given the defendant a specified time in which to execute the required stipulation, upon its default rejected its maps of definite location filed

May 10, 1907, and struck the same from the files, for the reason, as stated, that the defendant refused to execute the required agreement for the protection of the forests.

In the meantime no settlement of the controversy having been reached, the plaintiff commenced this suit, on June 25, 1909, while construction work was still in progress.

The Bill exhibits many of the facts hereinbefore set forth, and in addition thereto it is averred that the defendant, in violation of law, and without right, cut the timber growing upon the strip of land claimed as a right of way, and in some instances upon land adjacent thereto, aggregating approximately nine million feet board measure. And it is further averred that at the time the bill was filed the defendant had cleared portions, and was clearing other portions, of the alleged right of way, for the purpose of constructing its railroad, and in the process of such clearing and construction it was destroying [112] large amounts of small timber, and young growth, and had thrown, and was throwing and rolling, great quantities of rock, earth, gravel and debris in the St. Joseph River, a stream running through the National Forest, and by such obstructions the defendant was rendering the stream wholly unfit and useless for the purposes of navigation and logging. It is further alleged that, through lack of care and proper precaution, the defendant was causing fires to be started along the right of way, and large quantities of timber and young growth and

seedlings were being burned. It is still further represented that notwithstanding the warnings of representatives of the Forest Service the defendant was continuing to engage in such unlawful acts, and was threatening to continue therein, and to commit waste and trespass upon such forest land, and that it was the intention and purpose of the defendant wholly to disregard the requirements of the Secretary of the Interior and the Secretary of Agriculture, and to decline to execute any agreement or stipulation, or to await the approval of its maps of definite location by the Secretary of the Interior.

The prayer is that the defendant be required to execute and file with the Secretary of the Interior the form of stipulation prescribed, a copy of which is set forth in the Bill, and to refrain from obstructing the navigability of the St. Joseph River, and to refrain from cutting timber and constructing or operating its railroad until it shall have executed such agreement or stipulation, and until its maps shall be approved. Or, in the alternative, that the defendant be absolutely enjoined from constructing or operating its railroad upon any part of the Coeur d'Alene National Forest. There is the further prayer that damages be awarded.

While they have been considered, it would be wholly impracticable to review in detail the multitude of questions embraced in the voluminous and able briefs which have been furnished by counsel, and in the main, therefore, I shall content myself with a discussion of those which are thought to be controll-

ing. The fundamental question is the construction or interpretation to be given to the general right of way act of March 3, 1875 (18 Stat. 482). The plaintiff contends that by its terms it has no application to lands reserved as a national forest, and the defendant, maintaining the contrary view, takes the position that at the date of the Peck agreement it had acquired, or was enitled to acquire, the right of way in dispute without let or hinderance on the part of the Secretary of the Interior or the Forestry officials, and that, therefore, even if it be conceded that the agreement was properly and authoritatively executed, it was wholly without consideration, a mere *nudum pactum,* [113] and for that reason void and unenforceable. It is thought that the Government's contention must be sustained. Section 1 of the act purports to grant to qualified corporations a "right of way through the *public lands* of the United States," and by section 5 it is provided that it shall not apply "to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale." The phrase "public lands" is without precise technical signification (*United States* vs. *Blendauer,* 128 Fed. 910; *United States* vs. *Minidoka & S. W. R. Co.,* 190 Fed. 491), and section was doubtless added for the purpose of excluding the possibility that the act would be so construed as to affect publicly owned lands embraced in the classes of reservations specifically named, or otherwise "specially reserved from sale." Clearly, if the language is to be given its ordinary import,

lands withdrawn from entry by executive proclamation, and set apart as a forest reserve, are "lands specially reserved from sale," and no valid reason is apparent why its meaning should be limited, or, by resort to a strained construction, we should exclude this class of reservations from its operation. In some of its features the "right-of-way act" is out of harmony and is incompatible with the general object and purpose of the forestry laws. It is true that the public interests may, and generally will, be subserved by the construction and operation of railways through national forests; they make more available for use the products of the forest, and in case of emergency, where fires have been started, they may be of the greatest service in facilitating communication and transportation. But upon the other hand, unless the representatives of the public interest are authorized to exercise some control over the location of the lines of such roads and the manner in which they shall be constructed, and shall have the power to require precautions to [114] be taken against loss by fire, always a peril incident to the use of coal-burning locomotive engines, the railroad may become more of a menace than a benefit. Moreover, if the act is applicable at all it must be held to be applicable in its entirety, and therefore if a railway company is entitled to appropriate as its right of way a strip of land 200 feet wide, upon such line as it may see fit, through a forest reserve, it may also take to the amount of twenty acres for station purposes, to the extent of one station of each ten miles of road, and

it may likewise cut from the lands adjacent to the right of way such timber as may be required for the construction of its road,—all of which rights are expressly conferred by the act. It is not impossible to conceive conditions where, if such be the absolute and unrestricted rights of the railway company, the usefulness of a small forest reserve for the purpose for which it was intended may be greatly impaired, if not wholly destroyed.

It may be added that apparently the view that forest reserves are not subject to the operation of the act of 1875 was ascertained by Congress, for we find that during the period following the passage of the original forest reserve act (March 3, 1891), and prior to the right of way legislation of March 3, 1899, next to be considered, several special acts were passed, for the purpose of granting railroads a right of way across forest reserve lands. See, for example, Act of May 28, 1896, 29 Stat. 190; Act of June 6, 1896, 29 Stat. 253; Act of May 18, 1898, 30 Stat. 418; Act of February 28, 1899, 30 Stat. 910.

In the general deficiency act of March 3, 1899 (30 Stat. 1219, 1233), is found the following isolated paragraph:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site, when in his judgment the public interests will not be injuriously affected thereby." [115]

The language of this remarkable provision is truly

cryptic in its obscurity, and is perhaps susceptible to any one of three or more different constructions. In the view put forward by the Government, the reference to "existing law" operates only to adopt the forms and procedure prescribed by, and carries forward nothing of the vitality of such laws. But apparently under such a literal meaning the measure becomes meaningless, for the mere approval of maps and surveys is in itself an idle and useless thing to do. The paramount and only important consideration is the force or effect of such approval, and upon that question not only is the provision entirely silent, but light can be drawn neither from the title of the act in which it is found nor from its context. Let us suppose that the "existing law" simply prescribed forms of procedure, and conferred no right; the provision in itself contains no words of grant, and upon what theory could it be contended that the Secretary's approval would operate to effect a grant or confer any right whatsoever? It would therefore seem that, to render the enactment effective for any real purpose, it becomes necessary not only to import the forms and procedure, but also a measure at least of the potency and effect signified thereby in the system from which they are borrowed.

In another view the provision operates to carry forward and make applicable to forest reserves the whole of the act of 1875. It is not impossible that Congress, taking cognizance of existing doubts touching both the application of, and the discretionary power of the Secretary of the Interior under the general Act, intended thus to clear up both doubts,

by declaring it to be applicable to forest reserve lands, with the added restriction that in no case should a grant be effected without the consent of the Secretary of the Interior. The objection to this construction is that under it there are carried forward [116] certain provisions of the general Act which, as we have already stated, are thought to be out of harmony with the spirit, and incompatible with the purpose of the forestry laws, a view which apparently Congress entertained, for in each of the special right of way acts above referred to, passed shortly before the enactment of this provision, while the general act of 1875 is adopted and made applicable as a whole, there is expressly excepted from the privileges conferred thereby the right to take timber from adjacent lands.

Still another view, and I am inclined to think a better one, is, that the provision extends only to what may be strictly called the right of way features of the act of 1875, to the exclusion of other rights and privileges thereby conferred, and that in the express adoption of the forms and procedure in that act prescribed, and the authorization of the Secretary of the Interior at his discretion to file and approve maps and surveys tendered in conformity therewith, there is necessarily implied the intent that such approval shall operate to consummate a right of way grant, such as would be effected by a like approval of similar plats and surveys upon public unreserved lands under the act of 1875. There is no substantial difficulty in limiting its operation to the right of way feature, for in terms it purports to re-

late to no other subject or privilege.

However at this juncture an extended discussion of these several theories is unnecessary, for the reason that in no view of its doubtful features can the act of 1899 be made to avail the defendant. Whether it be construed as being substantively independent of the act of 1875, or as adopting it in part, or as making it in all respects applicable to forest reserves, and whatever may be the nature or extent of the rights which it confers, it unmistakably conditions the acquisition of any [117] right upon the consent of the Secretary of the Interior, and, such consent having been withheld, it is without efficacy as a defense.

We now come to the consideration of the important question, what, if any, rights the defendant acquired in these lands prior to their reservation, and while they remained subject to the operation of the act of 1875. The order of the Commissioner of the General Land office temporarily withdrawing the lands from entry and sale antedated the defendant's organization, and it follows that if the order was valid there is no possible ground upon which it can be held that by the subsequent filing of the articles of incorporation and proofs of organization, and, later, maps of definite location, any right whatsoever was perfected or even initiated; and I am inclined to the view that the validity of the order must be sustained. In the present inquiry it is all the time to be borne in mind that the issue here arises, not between the defendant and a third person, each claiming priority of right to land which the Government is willing to convey to

the one showing the better right, but between the defendant and the Government itself, and the question therefore is whether and when the defendant became vested with any interest which the Government is bound to respect. *Royal Packing Co.* vs. *United States,* 199 U. S. 579; *Stalker* vs. *Oregon S. L. R. R. Co.,* 225 U. S. 142.

These were public lands wholly free from private claims, and subject to the control and disposition of the plaintiff, both as proprietor and sovereign. By general law it had established the policy of reserving from entry and sale portions of its forest-bearing lands, and had invested the President with the authority from time to time to establish reservations, and to fix and declare the boundaries thereof. Intelligently to exercise this authority and to give effect to the expressed will of [118] Congress, it became necessary to make preliminary investigations, including surveys for the purpose of determining whether or not the lands in any given locality were of such character that they fell within the terms of the act, and of preparing a proper description for their identification. Now, it cannot be doubted that while this preliminary work is going on the lands under investigation must be held exempt from private entry, for otherwise, upon its becoming known that the creation of a forest reserve is in contemplation, the project may be greatly hampered, if not wholly frustrated, by the initiation, through private entry, of claims to valuable and salient portions thereof. Hence the temporary withdrawal here was in aid of and incidental to the permanent reservation which

the President was empowered to make, and it should therefore he held that the power to proclaim the reservation necessarily implied the authority to declare the withdrawal. It thus appears, and the consideration is emphasized, that here the withdrawal was not made merely or primarily to prevent private entry, but for the ultimate purpose of enabling the President fully to accomplish the object of a statute to which it was his duty to give practical effect; the action was taken, not capriciously or arbitrarily, but "in furtherance of a public purpose committed by Congress to the Executive to effectuate." The following authorities, while not involving the precise question, upon principle lend support to this view: *Wilcox* vs. *Jackson,* 13 Pet. 498; *Wolsey* vs. *Chapman,* 101 U. S. 755; *Grisar* vs. *McDowell,* 6 Wall, 363; *Wolcott* vs. *Des Moines Co.,* 5 Wall, 681; *Hamblin* vs. *Western Land Co.,* 147 U. S. 531; *Northern Pacific Ry. Co.* vs. *Musser-Sauntry L. L. & Mfg. Co.,* 168 U. S. 604; *Spencer* vs. *McDougal,* 159 U. S. 62; *Bullard* vs. *Des Moines,* 122 U. S. 167; *United States* vs. *Payne,* 8 Fed. 833; *John McKane,* 37 L. D. 277; *George Herriott,* 10 L. D. 513; [119] *John Campbell,* 6 L. D. 317; 17 Op. Atty. Gen. 258. The fact that the withdrawal was provisional and temporary in its character does not materially alter the case. *United States* vs. *Grand Rapids etc. R. R. Co.,* 154 Fed. 131. It ripened into a permanent reservation which should be held to relate back to the initiatory act.

The further point is urged that only the President has the authority to establish forest reserves, whereas

here the withdrawal appears to rest solely upon an order of the Commissioner of the General Land Office; but the order was in accordance with the express direction of the Secretary of the Interior, whose acts are in the premises to be deemed those of the President. *Wilcox* vs. *Jackson,* Pet. 498. *Wolsey* vs. *Chapman,* 101 U. S. 755, 769. In the former case it was said:

"Now, although the immediate agent in requiring this reservation was the Secretary of War,yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. * * * Hence we consider the act of the War Department in requiring the reservation to be made as being in legal contemplation the act of the President."

In the latter case, in response to the objection that a *proclamation* by the President is a prerequisite, and that a mere *order* of a departmental officer is not the equivalent thereof, the court said:

"A proclamation by the President reserving lands from sale is his official public announcement of an order to that effect, and no particular form of such announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers, who were to act under it, as notice to them of what they were to do in respect to the sales of public lands, we cannot doubt that the lands would have been reserved

by proclamation within the meaning of the statute. Such being the case, it follows necesarily from the decision in *Wilcox* vs. *Jackson,* that such an order sent out from the appropriate executive department, in the regular course of business, is the legal equivalent of the President's own order to the same effect. It was therefore, as we think, such a proclamation by the President reserving lands from sale as was contemplated by the act."

But if we assume that the preliminary withdrawal was [120] unauthorized by law, and therefore ineffectual for any purpose, what, if any, rights did the defendant have at the time of the execution of the Peck agreement? In that view the lands remained public and unreserved until November 6, 1906, the date of the President's proclamation. Prior to this time, namely, upon February 17, 1906, the defendant's articles of incorporation and proofs of organization were accepted and filed by the Secretary of the Interior; it is thought to be unimportant that amendments thereto were made subsequent to the proclamation. Defendant's first map was filed before, and the other two after, the date of the proclamation. I am inclined to the view that the first and second filings must be disregarded, and that May 22, 1907, the date of the last one, is to be taken as the date of the filing of defendant's map of definite location, under the act of 1875. Both the second and third maps purport to be, not amendments to the first map, but amended maps, and the routes exhibited are far from being substantially identical. Indeed the lines shown upon the first and last are distinct for the larger part

of the distance across the reservation, and for long stretches the two routes are separated by many miles of intervening territory. Upon receipt of the last map the other two were returned to the defendant, with the explanation that it was understood that they were superseded by the last one, and, so far as the record shows, no objection was at the time raised, and apparently the defendant acquiesced in this view of the case. But for practical purposes it is quite immaterial whether we consider only one or all three of the maps. Surely, in view of the wide divergence of the several routes, it cannot be held that the last filing relates back to the first. And hence, if the question of whether the filing was before or after the reservation was established by proclamation is of controlling importance in determining the rights of the defendant, so much of the route finally adopted and actually used in the construction of the road [121] is covered only by the later filings, that if, as to this portion, it is without legal right, and if therefore, as to such portion, it may be required either to remove its track or submit to conditions and terms to be imposed by the Secretary of the Interior, it would be without effective defense to the relief prayed for, even were it to be held that its right to the other portion, that covered by the earliest filing, is well founded in law. Upon that assumption the Peck agreement could not be held to have been without consideration; or, if such agreement may be wholly disregarded, the Secretary of the Interior imposes as a condition to the approval of the defendant's last filing, terms substantially as now demanded.

Assuming then that defendant's articles of incorporation and proofs of organization are to be deemed to have been accepted and filed before, and its maps of definite location after, the creation of the reserve, did it acquire a right of way under the act of 1875?

Replying upon a rule of law enunciated notably in the case of *Railroad Co.* vs. *Baldwin,* 103 U. S. 426, the defendant argues that the act is a grant *in praesenti,* although upon its face uncertain both as to the grantee and as to the lands affected by the grant; that upon the filing by the defendant, and the acceptance thereof by the Secretary of the Interior, of its articles of incorporation and proofs of organization, the grantee became identified, and thereafter the defendant was to be regarded as having the same status under the act that it would have had if it had been specifically named as a grantee therein, and therefore it at once became vested with a right of way across the public lands in Idaho within the general boundaries designated in its articles of incorporation; and that while at that date the grant was a floating one, and had still to be defined either by the filing of a map of definite location or by the actual construction [122] of the road, it constituted a vested right of which the defendant could not be divested by any subsequent change in the status of lands which were at that date public and unreserved. In other words, the contention is that the defendant's rights are precisely the same as they would have been if, upon February 17, 1906, while the lands in question were public and unreserved, Congress had passed an act naming it as grantee, and presently granting to it a right of way

200 feet wide through such lands, and that therefore any subsequent disposition of the lands was necessarily subject to such right of way,—as was held in the *Baldwin* case. If Section 1 were the whole of the act, the correctness of this position could not well be controverted, but by other provisions the grant is brought into closer analogy to the "land grant" feature than the "right of way" feature of the act considered in the *Baldwin* case, and while, therefore, as was there said concerning the land grant, the words used in the first section import an immediate transfer of interest, so that when the route is definitely fixed the title attaches as of the date the railroad corporation becomes a qualified grantee, the grant does not operate to affect lands which in the meantime have, by change of status, ceased to be public, or have fallen into one of the excepted classes enumerated in Section 5. The language of this section is, "That this act shall not apply to * * * any lands specially reserved from sale," and it is thought that the date as of which the status or character of the land is in all cases to control is the time when the railroad company first seeks to give practical effect to the grant by the definite location of its line of road, whether that be by the filing of the statutory map or by actual construction upon the ground. The view finds support in the following cases: *Spokane etc. R. R. Co.* vs. *Zeigler,* 61 Fed. 392; affirmed 167 U. S. 65; *United States* vs. [123] *Minidoka etc. R. R. Co.,* 190 Fed. 491; *Minneapolis etc. R. Co.* vs. *Doughty,* 208 U. S. 51; *Stalker* vs. *Oregon Short Line R. R. Co.,* 225 U. S. 142; and it is not in conflict with *Jamestown etc. R. R.*

Co. vs. *Jones,* U. S. 125, considered in the light of these more recent decisions. It must be borne in mind that the act is without limit as to either time or place, and in our effort to discover the legislative intent some regard must be had for the possible results in practice of the adoption of any given theory. For instance, it is provided that any section of a railroad must be completed within five years after the location of the route thereof, and forfeiture of rights is imposed as a penalty for default; but there is no limit of time for either commencing or completing construction, from the date of the filing of the articles of incorporation and due proofs of organization, and therefore, if the theory for which the defendant contends is to prevail, it will follow as of course that any "promoting" company may, at a nominal expense, be organized, and, by filing with the Secretary of the Interior the requisite papers, it can pre-empt a "floating" right of way, or, for that matter, any number of them, and hold them an indefinite length of time for speculative purposes. Not for light reasons should it be held that Congress intended that private persons who desire to purchase and improve portions of the public lands, and the Government itself in the execution of its plans for the conservation of its natural resources, should be compelled to proceed with the consciousness that at any moment they may be dispossessed of the most cherished part of their belongings by the definite location of one or more of such "floating" grants.

The following often-quoted passage from the opinion in *Noble* vs. *Union River L. R. Co.* (147 U. S.

165, 176), is set forth in defendant's brief and relied upon as establishing a rule in support of its view: [124] "The language of that section (Section 1) is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, etc.' The uniform rule of this court has been that such an act was a grant *in praesenti* of lands to be thereafter identified. *Ry.* vs. *Alling,* 99 U. S. 463. The railroad company became at once vested with the right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose."

But the only question which the Court was there considering was whether or not the Secretary of the Interior could vacate the approval by his predecessor of the railroad company's map of definite location, and thus nullify the grant. Moreover, the immediate context of the passage is quoted as follows:

"The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, *and, when decided, and his approval was noted upon the plats, the first section of the act vested the right of way* in the railroad company."

It thus appears that the phrase, "became at once vested," was used by the court in relation to the time, not when the railroad company filled its articles of incorporation and due proofs of organization, but when the Secretary of the Interior approved the maps

of definite location and such approval was noted upon the plats.

If the foregoing views are correct, the defendant acquired no rights under the act of 1875, and it being plain that under the act of March 3, 1899, a grant is conditioned upon the precedent approval of the Secretary of the Interior, which the defendant has failed to obtain, the conclusion follows that it is without any right other than such as it may have obtained by reason of its execution, and the Government's approval and acceptance, of the Peck agreement.

And this brings us to a consideration of the question whether, under the circumstances, the plaintiff may be granted any relief in a suit in equity. Primarily the prayer is for the specific performance of the Peck agreement, to which relief the [125] defendant interposes several objections. It is first said that equity will not enforce an agreement to make an agreement; but this rule is not without important exceptions, notably in cases where the agreement is for the execution of formal contracts of security, or contracts of insurance and indemnity, or contracts affecting the title to, or possession of, lands. 36 Cyc. 567.

It is next contended that when he signed the agreement Peck was laboring under a mistake as to the relative dates of the order of withdrawal and the President's proclamation upon the one hand, and the defendant's filings upon the other. Assuming, without deciding, that such an extraordinary mistake was made, it should not be held to defeat the plaintiff's prayer. In the first place it related to a condition

upon which, as we have already seen, the legal rights of the parties in no wise depended, and the defendant's claim to a right of way was quite as much without legal validity in one view of the facts as in the other. But aside from the consideration, the dates should have been known by the defendant, if not as a matter of law, then by reasonable diligence as a matter of fact. They were of public record at the very place where the agreement was executed, and could have been ascertained upon the most casual examination. If the defendant through its own neglect failed to inform itself it cannot now successfully interpose its ignorance as a reason why it should not discharge the obligations of an agreement the benefit of which it has taken, and surely not without returning the consideration which it has received. The obligations of the agreement are not harsh or unconscionable, but are only such as the Secretary had the legal right to impose, and such as the defendant was bound to assume as a condition of its securing a right of way; and which, with a knowledge of all the facts, it doubtless would have assumed in order to avoid delay in the prosecution of the construction of its road. [126]

Uncertainty of the agreement is also urged as a ground for denying specific performance, but it is not thought that any serious difficulty is encountered under this head.

The defense that equity will decline to decree the specific performance of a continuous duty is without merit, for the decree here may with propriety go only to the extent of compelling the defendant to execute

the required stipulation; relief for any subsequent violations or threatened violations of such stipulation is a matter for future consideration.

Finally it is contended that the agreement is lacking in mutuality. In so far as there is any substance to the point, it is based upon the limited capacity of the Government officers to enter into binding contracts, and upon the exemption of the sovereign from the compulsion of judicial process. It cannot be successfully urged that the agreement was not fully executed by the defendant. Peck was delegated to represent it in the negotiations for the desired right of way, and he acted within the scope of his authority. The notation made by the acting Forester, to the effect that acceptance was "subject to ratification" by the Company, was for the benefit of the plaintiff, and could be waived by it. But ratification is to be presumed from the subsequent conduct of the defendant,—in that it failed to repudiate the known act of its agent within a reasonable length of time, and it accepted, during a period of many months at least, the benefit and protection of the agreement.

It is true that a claim is made that the company was not advised of the Peck agreement until some time in October, 1907, but while certain officers of the company may have remained in ignorance, under the circumstances of the case as shown by the record it is wholly incredible that Peck failed to report the results of his mission to anyone, and that no curiosity was aroused as to how it came about that the known opposition of the [127] forestry officials to the accupation by the defendant of a right of way sud-

denly disappeared. Moreover, there never was any express or clear repudiation of the Peck agreement, and we find that as late as December, 1907, while declining at that time to sign a form of stipulation tendered by the Government officers, the defendant, instead of electing to stand solely upon its alleged legal rights, requested as a favor that the matter be left open for further negotiations, and that in the meantime it be permitted without interruption to prosecute its construction work, with the implied understanding, as must be inferred, that it would make proper adjustment. If Peck was without authority, or if the defendant was unwilling to be bound by the agreement, why did it not promptly and openly repudiate it, instead of thus temporizing until it had in its possession every advantage which the agreement was intended to secure? Can it for a moment be supposed that the Government would have stayed its hand, if the defendant's representatives had at that time intimated that even though it should ultimately be concluded that under the law it had no right upon the reservation without the consent of the Secretary of the Interior, it would refuse to abide by the Peck agreement, and that, as it is now doing, it would put forward as a defense to any relief which might be sought, the very possession which it was asking as a favor to be permitted to take and hold without molestation? The only proper construction that can be put upon what then occurred is that both parties understood that the agreement would control, unless they should be able to reach some other arrangement mutually satisfactory.

It is undoubtedly a general rule that the specific performance of a contract will not be decreed against one party unless it is capable of being enforced against the other. *Marble Co.* vs. *Ripley,* 10 Wall. 339, 359; *Pantages* vs. *Grauman,* 191 Fed. 318, 323; but the rule is subject to numerous exceptions. [128] Indeed in the last edition of Pomeroy on Equity Jurisprudence (Equitable Remedies), Vol. VI, Section 769, the learned author says:

"The frequent statement of the rule of mutuality—'that the contract, to be specifically enforced, must as a general rule be mutual, that is to say, such, that it might, at the time it was entered into, have been enforced by either of the parties against the other,' is open to so many exceptions that it is of little value as a rule."

Thereupon the author states what he conceives to be the extent of the modern rule, as follows:

"If at the time of the filing of the bill in equity, the contract being yet executory on both sides, the defendant, himself free from fraud or other personal bar, could not have the remedy of specific performance against the plaintiff, then the contract is lacking in mutuality."

But here it appears that the Government has substantially performed its part of the agreement, and, having voluntarily submitted itself to the jurisdiction of the Court, it or its authorized officers can be required to file and formally approve the defendant's maps as a condition to the delivery of the executed stipulation, for which it prays.

"The rule (of mutuality) governs only such con-

tracts as are executory, for when the party who is not bound has performed his part under the contract, even though not legally bound to such performance, the plea of want of mutuality cannot be made." 22 Am. & Eng. Ency. of Law, 1020.

"If the plaintiff has performed his unenforceable promise, the fact that before such promise there was a lack of mutuality in the remedy is no defense." 36 Cyc. 631.

In *Mississippi Glass Co.* vs. *Franzen* (C. C. A. 9th Cir.), 143 Fed. 501, it was said:

"The doctrine of nonenforceability in equity of a contract for lack of mutuality has no application to an executed contract. *Green* vs. *Richards,* 23 N. J. Eq. 32, 35; *Hulse* vs. *Bonsack Machine Co., supra* (65 Fed. 864, 13 C. C. A. 180); *Grove* vs. *Hodge,* 55 Pa. 504, 516. In the last-cited case the Court, speaking by Judge Strong, said: 'Want of mutuality is no defense to either party, except in cases of executory contracts. It has no applicability to an executed bargain. There are many where the [129] obligation is all upon one party. As to one the obligation was fulfilled, the contract was executed, when it was made. As to the other party it remained executory. A consideration may be either something done, or something to be done, or a promise itself. When it is something already done, it is idle to talk of want of mutuality. That is to be considered only when the obligations of both parties are future.'" See, also, *Louisville etc. R. Co.* vs. *Flannigan,* 113 Ind. 488, 14 N. E. 370.

In conclusion upon this branch of the case, it

should be added that in the absence of insurmountable obstacles this form of relief should be adopted, for in the alternative the defendant must submit either to process of ejectment or to an injunctive order restraining it from maintaining or operating its railway within the boundaries of the forest reserve. Putting aside all consideration of the consequences to the defendant itself, only for the most cogent reasons should the Court resort to either of these courses, fraught, as of necessity it would be, not only with great inconvenience to the public, but with irreparable loss to private persons who have valuable property rights, growing out of the construction, and dependent upon the maintenance and operation, of the road. No such imperative reasons appear, and the defendant will therefore be required specifically to perform its agreement. *Price* vs. *Mayor etc. of Penzance,* 4 Hare, 506; *Fry on Specific Performance,* sec. 83; *Lane* vs. *Pac etc. R. R. Co.,* 8 Idaho, 230; 67 Pac. 656.

Two other branches of the case remain for disposition, but they are incidental, and I have decided to postpone their consideration to a later date. The one is the precise form of the stipulation which the defendant shall be required to sign, and the other is the amount of damages, if any, which shall be awarded. There is in the record a form of stipulation which the plaintiff desires to have signed, but apparently in material respects it differs from the Helena stipulation, to which reference is made in the Peck agreement, and which it is thought must control the stipulation here. In the briefs little atten-

tion is given to this feature of the case, and it has occurred to me that in view [130] of the conclusion here that the defendant will be required to execute a stipulation, counsel can agree upon the form thereof. On the part of the plaintiff it must be borne in mind that it has come into court seeking the enforcement of a specific agreement, and it follows that it must submit to being bound thereby. As a suitor its status is substantially that of a private litigant. *United States* vs. *Detroit Lumber Co.*, 200 U. S. 321, 339; *United States* vs. *Mountain Copper Co.*, 142 Fed. 625; *United States* vs. *Grand Rapids etc. R. R. Co.*, 154 Fed. 131, 136. It may be that the Secretary of the Interior would have had the right to impose upon the defendant all of the conditions specified in the form which has been furnished, but the question here is not what might have been required, but what was required; and the only obligations imposed upon the defendant was that it should execute a stipulation "as nearly as practicable" like the one of January 18, 1907, relating to the Helena national forest; and hence the stipulation here must be the guide. At least in so far as the record informs me, there is no question of the "practicability" of charging the defendant at the same rate for timber used by it upon this forest as was charged in the case of the Helena forest, but in the form here furnished a higher rate is specified. I also note a difference in the width of the space to be cleared outside of the right of way. It is possible, however, that this provision is not onerous to the defendant, and it makes no objection thereto. The form also contains some entirely new

provisions. If counsel cannot agree, each side is invited to furnish a draft as nearly like the Helena stipulation as is deemed to be "practicable," with a brief summary of the reasons why in any particular respect there should be any deviation. [131]

Inasmuch as the question of damages may, under some contingencies, be dependent upon the contents of the stipulation which shall finally be required, and upon the attitude of the parties relative thereto, it will be passed for the present.

The parties may have twenty days in which either to agree upon the form of stipulation or to furnishing drafts embodying their respective views, as above suggested.

(Filing Endorsement.) [132]

Supplemental Decision.

(Caption.)

DIETRICH, District Judge.

On April 1, 1913, a decision was filed herein disposing of the principal questions, but leaving certain issues to future consideration. Subsequently, and in compliance with the suggestion made in the decision, the parties stipulated a form of agreement to be executed by the defendant, as appears from stipulation filed herein on May 7, 1913. The form of agreement thus stipulated is adopted, with the addition of a paragraph providing that such agreement shall be deemed to have been executed as of date May 10, 1907, which is the date of the Peck memorandum, and the date of the filing of the last map of definite location by the defendant company.

If this stipulation or agreement had been entered into in accordance with the Peck memorandum the defendant would thereby have become obligated to pay to the plaintiff at the rate of $3.00 per thousand feet board measure for usable or merchantable timber cut upon the right of way and upon additional strips referred to in Clause 1 of the agreement, and also to pay for any and all damages caused by fires, or otherwise sustained by the plaintiff, by reason of the use and occupation of the National Forest by the defendant. Accordingly, I have adopted $3.00 per thousand as the proper measure of value for the timber cut and the mature timber burned, and, applying such measure, I find that the plaintiff is entitled to recover from the defendant $26,989.00 for timber cut upon the right of way and contiguous lands, and $12,000.00 on account of mature timber burned. I also find that the plaintiff is entitled to recover $24,000.00 for immature timber destroyed by [133] fire, and $5,500.00 on account of rock and other debris wrongfully thrown into the St. Joe River and its tributaries. These several amounts necessarily rest in more or less uncertainty, especially those relating to the immature timber and the damage to the channel of the river, but upon the whole it is thought that the conclusion stated is reasonably fair to both parties. The total sum, therefore, which it is found the plaintiff is entitled to recover is $68,489.00.

Counsel for the Government are directed to prepare proper from of decree in accordance with the conclusions reached in this and the primary opinion. The decree should provide a reasonable length of

time for the proper execution by the defendant company of the stipulation or agreement, and should require an approval by the proper department of the defendant's map of definite location, as a condition precedent or concurrent with the delivery of such executed agreement, such approval to relate back to May 10, 1907, and should further provide that execution may, in accordance with the practice of the Court, issue for the amount of money adjudged to be due from the defendant to the plaintiff. Costs will be awarded to the plaintiff. It is directed that such decree be submitted to counsel for the defendant for their approval or objections as to form.

(Filing Endorsement.) [134]

Decree.

(Caption.)

This cause came on regularly to be heard, the complainant appearing by C. H. Lingenfelter, United States Attorney, and W. C. Henderson, Esq., the defendant appearing by F. M. Dudley, Esq., and upon agreement of counsel and upon consideration thereof, it is ordered, adjudged and decreed as follows:

First: That within thirty (30) days from the date hereof the defendant shall deliver into this court the duplicate maps of its definite location through the Coeur d'Alene Forest Reserve; (now St. Joe National Forest), heretofore filed in said Coeur d'Alene United States Land Office May 10, 1907, or a duplicate thereof; and shall also within said time execute and deliver into court the following stipulation.

UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE.

Chicago, Milwaukee & St. Paul Ry. Co. of Idaho. Application for Right of Way St. Joe National Forest.

WHEREAS, a part of the railroad right of way of the Chicago, Milwaukee & St. Paul Railway Company of Idaho (hereinafter designated as "The Company"), as shown by a certain map of location filed by the Company in the Department of the Interior on May 10, 1907, under the Acts of March 5, 1875, and March 3, 1899 (said right of way being two hundred (200) feet in width), is located within the Coeur d'Alene Forest Reserve (now St. Joe National Forest) Idaho, and [135]

WHEREAS, the regulations of the United States Department of the Interior concerning rights of way for railroads, reservoirs, canals, etc., provide that whenever such rights of way are located upon National Forests, the applicant must enter into such stipulations and execute such bonds as the Secretary of the Department of Agriculture may require for the protection of the National Forests; and

WHEREAS, the Secretary of Agriculture requires for the protection of the said Coeur d'Alene Forest Reserve (now St. Joe National Forest) that the Company shall enter into the stipulation hereinafter set forth; and

WHEREAS, the Secretary of Agriculture, in order to protect the said National Forest from fire, requires the Company to clear and keep clear a strip of land one hundred and fifty (150) feet wide on each

side of its right of way, except as hereinafter provided, and has permitted the Company to use or sell the timber on said right of way and additional strips, upon payment as provided in Clause 2 hereof;

NOW, THEREFORE, the Company, in consideration of the premises, does hereby stipulate, agree and bind itself, its successors and assigns, as follows, to wit:

Clause 1. To clear and keep clear of all timber and other inflammable substance all said right of way, and all other lands controlled by the Company, as a right of way, however acquired, between the points where the center line of said railway intersects the exterior [136] boundary lines of said National Forest, and all lands of said National Forest lying within two hundred and fifty (250) feet of said center line and being contiguous to said right of way; except such land as the Forester may specifically exclude in writing from the operation of this clause, as, for example, when a stream, the right of way of another company, or other adequate fire-break lies between the right of way of the Company and the timber on the said National Forest;

To dispose of all brush and other refuse in said clearing as required by the Forest Officer in charge;

To cut all trees when physically possible, so that they will fall entirely within the strip to be cleared under this clause; and as far as is practicable, to pile no timber or wood within one hundred (100) feet of the edge of the timber on the said National Forest.

Clause 2. To pay to the Western Montana National Bank, of Missoula, Montana (U. S. Deposi-

tory), or to such other depository or officer as may be hereafter designated by the United States, to be placed to the credit of the United States, for all timber and wood cut within the said right of way, and within the additional strips referred to in Clause 1 hereof, which at the time of cutting belonged to the United States, such lump sum as may be actually agreed upon, or at the rate of one dollar ($1) per cord for wood, and three dollars ($3) per thousand feet board measure, for usable or merchantable timber, and in case of dispute the decision of the Forester shall be final, except that in lieu of the payments provided above the Company may, as to all timber or wood hereafter cut, pile the same separately in compact piles and with the limbs lopped off, and leave [137] for disposal by the Forest Service, any timber or wood which the Company does not wish to use or sell, and to transport such timber and wood, if sold by the Forester, at the established freight rates.

Clause 3. To put in a sidetrack sufficient to handle timber and wood sold from the said National Forest.

Clause 4. To construct and maintain in good and passable condition across the said right of way, free of charge or expense to the United States, crossings for all such now existing roads and trails intersected by the company's railroad within the said National Forest, as may be mutually agreed upon as necessary and practicable.

Clause 5. The Company and all contractors and others employed by the Company, shall observe such reasonable precautions against fire as the Forester

may prescribe (but this shall not be construed as authorizing the Forester to require the Company to use oil as fuel in its locomotives), and shall at all times exercise the utmost care to prevent fires, and shall promptly and without charge give all reasonably possible assistance in men and material, under the direction of the Forest Officer in charge, to fight fire within the said National Forest, adjacent to the said right of way.

Clause 6. To pay to the Western Montana National Bank, of Missoula, Montana (U. S. Depository), or to such other Depository or officer as may be hereafter designated by the United States, to be placed to the credit of the United States, for any and all damage caused by fires, or otherwise sustained by the United States by reason of the use and occupation of the said National Forest by the Company, its successors and assigns; and it is agreed by the parties hereto that if any damage shall occur to the National Forest lands by fires started by the **[138]** Company on other lands, the liability of the Company for such damages shall be determined by the laws of the State of Idaho or the United States, if applicable thereto.

Clause 7. To make any assignment or transfer of this right of way through the said National Forest expressly subject to the fulfillment of all the conditions herein contained, by the assignee or transferee.

This stipulation shall be deemed to have been executed on May 10, 1907, and shall have the same force and effect so far as practicable as if it had been executed on the said date.

IN WITNESS WHEREOF, said corporation has

caused these presents to be executed and its corporate seal to be hereto affixed at ..... on this ....day of ....., 1913, by its President and Agent hereto duly authorized.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO.

By .....,

Its President.

[Corporate Seal]

Attest: .....

.....

Such stipulation to be delivered to the plaintiff by the Court upon the approval by the Secretary of the Interior of said maps, such approval to relate back to May 10, 1907.

Second. That the complainant do have and recover from the defendant the sum of $68,489.00, being the sum found to be due the Complainant from the Defendant as damages, together with costs of suit taxed at $703.70; and that in default of the payment of the said amount so found and costs, after the approval as aforesaid by the Secretary of the Interior of said maps, execution shall issue therefor.

FRANK S. DIETRICH,

District Judge. [139]

(Endorsement Filing.)

In the United States District Court for the District of Idaho, Northern Division.

No. 403.

UNITED STATES OF AMERICA,
Complainant,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,
Defendant.

Notice of Presentation of Condensed Statement of the Evidence to be Included in the Record on Appeal.

To the Solicitors for the Complainant in the Above-entitled Cause:

You are hereby notified that a condensed statement of the evidence to be included in the record on an appeal to be taken in the above-entitled cause was lodged in the office of the Clerk of the above-entitled court for your examination, on the 15th day of November, 1913, of which a copy is annexed to this notice and delivered to you, and that the same will be presented to Honorable Frank S. Dietrich, Judge of the above-entitled court, to be approved and certified by him, pursuant to Equity Rule 75, at Boise, Idaho, on Monday, November 24th, 1913, at ten o'clock A. M., or as soon thereafter as counsel may be heard.

F. M. DUDLEY,
H. H. FIELD,
Solicitors for the Chicago, Milwaukee & St. Paul Railway Company of Idaho, Defendant.

A copy of the above notice and of the annexed statement of the evidence to be included in the record on appeal received this 17th day of November, 1913.

Rights reserved.

C. H. LINGENFELTER,

Solicitor for the United States of America, Complainant. **[140]**

Condensed Statement of the Evidence to be Included in the Record on Appeal

(Caption.)

By a stipulation signed and filed, the parties agreed that for the purpose of a trial of the above-entitled cause the following facts shall be deemed and taken to be true.

I.

That on the 11th day of February, 1904, the Secretary of the Interior promulgated regulations concerning railroad rights of way over the public lands, which, after setting forth in full the act of Congress, approved March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States" (18 Stat. p. 482), also the provisions of the act of Congress, approved March 3, 1899 (30 Stat. 1233), that *in the form provided by existing law* the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will

not be injuriously affected thereby, prescribes rules and regulations including the following:

[Rules and Regulations Promulgated by Secretary of the Interior.]

"2. Whenever a right of way is located upon a forest or timber-land reserve the applicant must file a stipulation under seal incorporating the following:

(1) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.

(2) That the applicant will cut no timber from the reserve outside the right of way.

(3) That the applicant will remove no timber within the right of way, except only such as is rendered necessary by the proper use and enjoyment of the privilege for which application is made, and that he will also remove from the reservation, or destroy, under proper safeguards, as determined by this office, all standing, fallen **[141]** and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be determined by the General Land Office to be essential to protect the forest from fire to the fullest extent possible.

(4) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business. (Acting Secretary, September 2, 1902.)

The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such

bond stipulating that the makers thereof will pay to the United States 'for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur.' A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat. 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond cannot be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given.

* * * * * * * * * * *

4. Lines of route or station grounds lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to those regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see paragraphs 16 and 17.)

5. Any railroad company desiring to obtain the benefits of the law is required to file, through this

office, or they may be filed with the register of the land district in which the principal terminus of the road is to be located, who will forward them to this office—

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of that State or Territory is required that it has complied with the laws of such State or Territory governing foreign corporations, to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according

[142] to the existing law of the State or Territory in which it is incorporated. (Form 1, p. 489.)

Sixth. A certificate by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2, p. 490.)

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

6. The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field-notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field-notes of the survey of the line of route or of the station grounds.

* * * * * * * * * * *

16. Maps or plats of lines of route or station grounds lying wholly on unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which

the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps or plats will not dispense with the filing of maps or plats after the survey of the lands and within the time limited in the act granting the right of way, which map or plat, if in all respects regular when filed, will receive the Secretary's approval.

* * * * * * * * * * *

21. When maps are filed, the register will note on each the name of the land office and the date of filing, over his written signature. Notations will also be made on the records of the local land office, as to each *unpatented* tract affected, that application for right of way is pending, giving date of filing and name of applicant. The register will certify on each map, over his written signature, that unpatented land is affected by the proposed right of way. The maps and field-notes in duplicate, and any other papers filed in connection with the application, will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office. Any valid right existing at the date of the filing of the right of way application will not be affected by the filing or approval thereof. (See paragraph 1.) If no unpatented land is involved in the application, the

local officers will reject it, allowing the usual right of appeal.

22. Upon the approval of a map of location by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will mark upon the township plats the line of the railroad or location of station grounds, as laid down on the map or plat. They will also note, in ink, on the tract books, opposite each **[143]** tract marked as required by paragraph 21, that the same is to be disposed of subject to the right of way for the railroad company's line of road or station grounds.

23. When the railroad is constructed, an affidavit of the engineer and certificate of the president (Forms 5 and 6, p. 490) must be filed in the local office, in duplicate, for transmission to this office. No new map will be required, except in case of deviation from the right of way previously approved, whether before or after construction, when there must be filed new maps and field-notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map amended definite location is approved by the honorable Secretary."

II.

That on April 25th, 1906, the Secretary of the Interior promulgated the following additional and amendatory regulations:

[Additional and Amendatory Regulations Promulgated by the Secretary of the Interior.]

"In accordance with the agreement made by and between the Department of the Interior and the Department of Agriculture, paragraph 2 of the circular of February 11, 1904 (32 L. D. 481), and paragraphs 3 and 66 of the circular of September 28, 1905 (34 L. D. 212), except the last clause in each relative to construction in advance of approval or specific permission, which will remain as at present, are hereby amended so as to read as follows:

Whenever a right of way is located upon a forest or timber-land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserve.

This amendment applies to forest or timber-land reserves only, not to national parks."

III.

That on March 21, 1905, the Commissioner of the General Land Office transmitted to the register and receiver of the United States District Land Office at Coeur d'Alene City, Idaho, the following letter, which (omitting formal parts and signatures) reads as follows:

[Letter, Dated March 21, 1905, Commissioner of General Land Office to U. S. District Land Office at Coeur d'Alene, Idaho.]

"By direction of the Secretary of the Interior, I hereby temporarily withdraw from all disposal, except under the mineral laws, all the vacant unappropriated public lands in the following described area in your district:

All of townships 42–N. and 43–N, lying east of Range 2–E.

All of township 44–N., lying east of Range 3–East.

All of township 45–N., lying east of Range 4–East.

All of townships 46–N. and 47–N., lying east of Range 2 East.

All of Boise Meridian, Idaho.

Note this withdrawal upon the records of your office." **[144]**

That at the same time he transmitted to the Register and Receiver of the United States Land Office at Lewiston, Idaho, a similar letter but describing only lands in townships 37, 38, 39, 40, 41 and 42 north.

IV.

That the defendant company is a corporation organized and existing under and by virtue of the laws of the State of Idaho for the purpose of constructing, maintaining and operating a line of railroad extending from the eastern to the western boundary line of said State; that the articles of incorporation of said company, having been duly executed, where filed in the office of the County Recorder of Nez

Perce County, Idaho, that being the county in which the principal business of the said company was to be transacted, Jan. 19, 1906, and thereafter, to wit: January 23, 1906, a copy of said articles was certified by the County Recorder and filed in the office of the Secretary of State of the State of Idaho; and at the same time there was duly filed the affidavit of H. R. Williams, who was then and there the President of said Railway Company, that there have been actually subscribed $150,000 of the capital stock of said Railway Company, being the amount of $1,000 per mile of the estimated length of said railway, as specified in said articles of incorporation, and there was then and there issued to the said corporation by the Secretary of State and such County Recorder over their respective seals, certificates that a copy of the articles containing the required statement of facts had been filed in their respective offices, that thereupon the said corporation duly completed its organization and has since remained and now is such organized and existing corporation. That, among other things, the said articles of incorporation, so filed, contain the following provisions, to wit:

[Excerpts from Articles of Incorporation of Chicago etc. Ry. Co.]

II.

"The purposes for which said corporation is formed are the construction, operation and maintenance of a steam railroad as hereinafter described for the carriage of freight and passengers, **[145]** the construction and operation of telegraph lines and

such other appurtenances as may be necessary or convenient for the construction, operation or maintenance of said railroad.

* * * * * * * * * * *

VIII.

"The railroad so to be constructed and operated is intended to be run from some convenient point to be located on the east boundary line of the State of Idaho between the 46th and 57th degrees of North Latitude; thence extending in a general westerly direction to some convenient point to be located on the west boundary line of the State of Idaho.

IX.

"The estimated length of said Railroad is one hundred and fifty (150) miles."

* * * * * * * * * * *

V.

That, to wit, on or about February 7, 1906, the said defendant Company transmitted to the Commissioner of the General Land Office at Washington, D. C., a copy of its said articles of incorporation duly certified to by the Secretary of State of the State of Idaho; a copy of the laws of the State of Idaho under which said corporation was organized, with the certificate of the Secretary of State of said State of Idaho that the same was the existing law; the certificate of the Secretary of State of the State of Idaho that the articles of incorporation and affidavit of subscription for the capital stock had been filed according to law in the office of the said Secretary of State of the State of Idaho, with the date of filing thereof; an official statement under the seal of

the secretary of said corporation that the organization thereof had been completed and that the said Company was fully authorized to proceed with the construction of its railroad according to the existing laws of the State of Idaho in which it was incorporated; a certificate by the president of said defendant corporation under the seal of said Company showing the names and designations of its officers at the date of the filing of such proofs of organization.

That such papers were duly received by the Commissioner of the General Land Office at Washington, D. C., on or before February 16, 1906; and that on or about February 16, 1906, the said commissioner **[146]** of the General Land Office submitted said papers to the Secretary of the Interior with the recommendation that they be accepted for filing under the provisions of the Act of March 3, 1875, and, to wit, February 16, 1906, the said Commissioner of the General Land Office transmitted to the agent of this defendant corporation his certain letter in words and figures following, to wit (formal parts and signature omitted):

[Letter, Dated February 16, 1906, Commissioner of General Land Office to Agent of Chicago etc. Ry. Co.]

"You are hereby advised that by letter of this date a copy of the articles of incorporation and proofs of organization of the Chicago, Milwaukee and St. Paul Railway Co. of Idaho were submitted to the Secretary of the Interior with the recommendation that they be accepted for filing under the pro-

visions of the Act of March 3, 1875 (18 Stat. 489)."

That thereafter, to wit, February 17, 1906, the Acting Secretary of the Interior accepted said articles of incorporation and proofs of organization for filing and the same were duly filed in the office of the Commissioner of the General Land Office.

That on February 23, 1906, the Commissioner of the General Land Office transmitted to the said defendant corporation through its agent, Henry E. Davis, the following letter, to wit (formal parts and signature omitted):

[Letter, Dated February 23, 1906, Commissioner of General Land Office to Agent Chicago etc. Ry. Co.]

"You are hereby advised that on February 17, 1906, the Acting Secretary of the Interior accepted for filing under the provisions of the Act of March 3, 1875 (18 Stat. 482), the copy of the articles of incorporation and proofs of organization of the Chicago, Milwaukee & St. Paul Railway Co. of Idaho transmitted by your letter of February 7, 1906. The papers have accordingly been placed on file in this office."

VI.

That, to wit, on October 13, 1906, at the regular annual meeting of the stockholders of the Chicago, Milwaukee & St. Paul Railway Company of Idaho held at the office of said company in the City of Lewiston, Idaho, October 13th, A. D. 1906, a resolution was duly and regularly adopted and passed amending paragraphs 8 and 9 of the articles of incorporation of the said defendant company so as to make the same read as follows:

[Excerpt from Resolution of Stockholders of Chicago etc. Ry. Co., Dated October 13, 1906, Amending Paragraphs 8 and 9 of Articles of Incorporation of Said Company.]

VIII.

"The railroad so to be constructed and operated is intended to be run from a point upon the boundary line between the States of Idaho and Montana near Mile Post number one hundred forty-one (141) [147] of the survey of said boundary line; thence extending in a westerly direction through Shoshone and Kootenai counties and the Coeur d'Alene Indian Reservation to some convenient point to be located on the west boundary line of the State of Idaho within the limits of said reservation.

IX.

The estimated length of said railroad is one hundred (100) miles."

That thereupon, to wit, on said October 13, 1906, the said amendments to the said articles of incorporation duly certified by the proper officers of said company were filed for record and recorded in the office of the County Recorder of Nez Perce County, Idaho; that, thereafter, to wit, October 15th, 1906, a copy of said amendments duly certified by the County Recorder of said county of Nez Perce was duly filed for record and recorded in the office of the Secretary of State of the State of Idaho.

That thereafter, to wit, October 25, 1906, the said defendant corporation caused to be transmitted to the Commissioner of the General Land Office at Wash-

ington, D. C., a copy of the amendment of the articles of incorporation of said company duly certified to by the Secretary of State of the State of Idaho, together with the following letter of transmittal, to wit (formal parts and signature omitted):

[Letter, Dated October 25, 1906, Chicago etc. Ry. Co. to Commissioner of General Land Office at Washington, D. C.]

"I enclose herewith certified copy of an amendment to the articles of incorporation of the Chicago, Milwaukee & St. Paul Railway Co. of Idaho to be filed with the Secretary of the Interior under the provisions and in order to obtain the benefits of the right of way Act of March 3, 1875.

The original articles of incorporation and proofs of organization were filed in the office of the Secretary of the Interior and accepted for filing under the provisions of said Act on February 17, 1906, as per your letter to Henry E. Davis, Attorney, Washington, D. C., dated February 16, 1906 (D. 1906—23378) and February 23, 1906 (F. 1906—30163)."

That the said copy of the amended articles of incorporation was duly received by the Commissioner of the General Land Office, and thereafter and on or about November 16, 1906, were transmitted to the Secretary of the Interior; that the same were accepted for filing by the said Secretary of the Interior under the provisions of the Act of March 3, 1875, November 16, 1906, and were thereafter filed in the office of the Commissioner of the General Land [148] Office; that, to wit, November 22, 1906, the Commis-

sioner of the General Land Office transmitted to this defendant Company a certain letter in words and figures following, to wit (formal parts and signature omitted):

[Letter, Dated November 22, 1906, Commissioner of General Land Office to Chicago etc. Ry. Co,]

"You are hereby advised that on November 16, 1906, the Secretary of the Interior accepted for filing under the provisions of the Act of March 3, 1875 (18 Stat. 482) a copy of the amended articles of incorporation of the Chicago, Milwaukee & St. Paul Railway Co.

The papers have accordingly been placed on file in this office."

VII.

That between the 3d day of June, 1906, and the 13th day of October, 1906, the said defendant company caused to be surveyed, staked out and located upon the ground the line of its said proposed railway beginning at a point on the State line between Idaho and Montana, near the One Hundred and Forty-first (141) mile-post of the survey of the State line between the States of Idaho and Montana and running thence in a general westerly direction to a point on the west side of section twelve (12), in township forty-five (45) north, of range five (5) east, B. M., in Shoshone County, Idaho, and caused said survey to be shown a map and, to wit, October 20, 1906, by a resolution of its board of directors adopted the same as the definite location of the said railroad. Duplicate maps of said location, so adopted, having been duly prepared in the manner prescribed by the

rules and regulations of the Secretary of the Interior concerning railroad right of way over the public lands, the said Company, to wit, on the 23d day of October, 1906, caused said duplicate maps to be filed in the United States District Land Office at Coeur d'Alene City, Idaho; that there was endorsed upon the said duplicate maps so filed the affidavit of the chief engineer and the certificate of the president of said Chicago, Milwaukee and St. Paul Railway Company of Idaho, which affidavit and certificate were in words and figures following, to wit (formal parts and signature omitted): [149]

[Affidavit of Chief Engineer and Certificate of President of Chicago etc. Ry. Co. Endorsed on Maps.]

"E. J. Pearson, being duly sworn, says he is the chief engineer of the Chicago, Milwaukee & St. Paul Railway Company of Idaho; that the survey of said company's line of railroad described as follows: Beginning at a point on the State line between Idaho and Montana, said point being 66.68 feet distant northwesterly from the 4th angle post of the 141st mile of the survey of said state line, running thence in a southwesterly direction to a point on the north line of section 3, T. 46 N., R. 6 E., 418 feet west of the northeast corner of said section, a distance of 1.86 miles traversing unsurveyed lands; thence looping southwesterly and northwesterly through said section 3 leaving same at a point 330 feet east of the northwest corner of said section, a distance of 1.78 miles traversing surveyed lands; thence looping northwesterly and southwesterly entering section 4, T. 46 N., R. 6 E. at a point 918.3 feet west of the north-

east corner of said sec. 4, a distance of 0.83 miles traversing unsurveyed lands; thence looping southwesterly and northwesterly leaving section 5, T. 46 N., R. 6 E. at a point 2180 feet east of the northwest corner of said section 5, a distance of 3.49 miles traversing surveyed lands; thence running northwesterly to a point on the east line of section 36, T. 47 N., R. 5 E., 2160 feet north of the southeast corner of said section 36, a distance of 1.72 miles traversing unsurveyed lands; thence looping northwesterly and southwesterly to a point on the east line of Section 36, T. 47 N., R. 5 E. 886 feet north of the southeast corner of said section, a distance of 4.64 miles traversing surveyed lands; thence southeasterly to a point on the north line of section 6, T. 46 N., R. 6 E., 2486 feet west of the northeast corner of said section, a distance of 0.54 miles; thence southerly along the North Fork of the St. Joseph River and easterly along the St. Joseph River through Ts. 46 N., R. 6E., 46 N., R. 5E, and 45 N., R. 5 E., to a point on the west line of section 12, T. 45 N., R. 5 E., 1083 feet north of the southeast corner of said section, a distance of 14.96 miles traversing surveyed lands; a total distance of 29.81 miles was made under his direction as Chief Engineer of the Company and under its authority, commencing on the 4th day of June, 1906, and ending on the 13th day of October, 1906, and that the survey of the said line is accurately represented on this map and by the accompanying field-notes.

I, H. R. Williams, do hereby certify that I am president of the Chicago, Milwaukee & St. Paul Railway

Company of Idaho; that E. J. Pearson, who subscribed the accompanying affidavit, is the Chief Engineer of said company; that the survey of the said railroad, as accurately represented on this map and by the accompanying field-notes, was made under authority of the company; that the company is fully authorized by its articles of incorporation to construct the said railroad upon the location shown upon this map; that the said survey, as represented on this map and by said field-notes was adopted by resolution of its board of directors on the 20th day of October, 1906, as the definite location of the said railroad, described as follows:—beginning at a point on the State line between Idaho and Montana, said point being 66.68 feet distant northwesterly from the 4th angle post of the 141st mile of the survey of said State line, running thence in a southwesterly direction to a point on the north line of section 3, T. 46 N., R. 6 E., 418 feet west of the northeast corner of said section, a distance of 1.86 miles traversing unsurveyed lands; thence looping southwesterly and northwesterly through said section 3, leaving the same at a point 330 feet east of the northwest corner of said section, a distance of 1.78 miles traversing surveyed lands; thence looping northwesterly and southwesterly entering section 4, T. 46N., R. 6 E., at a point 918.3 feet west of the northeast corner of said Sec. 4, a distance of 0.82 miles traversing unsurveyed lands; thence looping southwesterly and northwesterly [150] leaving section 5, T. 46 N., R. 6 E., at a point 2180 feet east of the northwest corner of said section 5, a distance of 3.49 miles traversing surveyed lands; thence running northwesterly to a point on the east

line of Section 36, T. 47 N., R. 5 E, 2160 feet north of the southeast corner of said section 36, a distance of 1.72 miles traversing unsurveyed lands; thence looping northwesterly and southwesterly to a point on the east line of section 36, T. 47N., R. 5 E., 686 feet north of the southeast corner of said section, a distance of 4.64 miles traversing surveyed lands; thence southeasterly to a point on the north line of section 6, T. 46 N., R. 6 E., 2486 feet west of the northeast corner of said section, a distance of 0.54 miles; thence southerly along the North Fork of the St. Joseph River, and easterly along the St. Joseph River through Ts. 46 N., R. 6 E., 46 N. R., 5 E., and 45 N., R. 5 E., to a point on the west line of Section 12, T. 45 N., R. 5 E., 1083 feet north of the southeast corner of said section, a distance of 14.96 miles traversing surveyed lands; and that this map has been prepared to be filed in order to obtain the benefits of the act of Congress approved March 3d, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." I further certify that the said railroad is to be operated as a common carrier of passengers and freight."

That on the receipt of said maps the register of said land office filed the same and endorsed thereon his certificate as follows, to wit:

[Endorsement of Register of Land Office on Maps.]

"I, R. N. Dunn, Register of the United States Land Office at Coeur d'Alene, Idaho, do hereby certify that unpatented land is affected by the right of way of the Chicago, Milwaukee & St. Paul Railway as shown by this map."

That the said line of railroad as located and shown upon said maps traversed those certain lands which belong to the United States and which are set forth and described in the 5th paragraph of the bill of complaint herein.

That immediately after the filing of said maps the register of said United States District Land Office transmitted said maps to the General Land Office at Washington, D. C.

VIII.

That, to wit, November 6th, 1906, the President of the United States issued a certain proclamation which said proclamation is in words and figures as follows:

[Proclamation Issued November 6, 1906, by President of United States Re Coeur d'Alene Forest Reserve, Idaho.]

"COEUR D'ALENE FOREST RESERVE
IDAHO.
BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.
A PROCLAMATION.

WHEREAS, the public lands in the State of Idaho, which are hereinafter indicated, are in part covered with timber, and it appears that the public good would be promoted by setting apart said lands as a public reservation;

And whereas, it is provided by section twenty-four of the [151] Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, 'An act to repeal timber-culture laws, and for other purposes,' That the President of the United States may,

from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof;

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by section twenty-four of the aforesaid act of Congress, do proclaim that there are hereby reserved from entry or settlement and set apart as a Public Reservation, for the use and benefit of the people, all the tracts of land, in the State of Idaho, known as the Coeur d'Alene Forest Reserve on the diagram forming a part hereof.

This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists.

Warning is hereby given to all persons not to make settlement upon the lands reserved by this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 6th day of November, in the year of our Lord one thousand nine hundred and six, and of the Independence of the

United States, the one hundred and thirty-first.

By the President:

[Seal] THEODORE ROOSEVELT.

ROBERT BACON,

Acting Secretary of State."

That there was attached to said proclamation and made a part thereof a certain diagram, copy of which is hereunto attached as Exhibit "A," and hereby referred to and made a part of this stipulation.

IX.

That between November 9th, 1906, and February 16, 1907, said defendant company caused other and further surveys for the location of its said railroad extending from the eastern boundary of the State of Idaho to a point in the west line of Section twelve (12), township forty-five (45) north, of range four (4) east, B. M., in Shoshone County, Idaho, to be made, and staked out and located upon the ground a line of route for its said railroad differing in some respects from the line of route as shown upon the said map filed October 23, 1906, as hereinbefore set forth and the said Company having caused a map of said route to be prepared it, to wit: by resolution of its Board of Directors duly passed March 18, 1907, adopted said route as the line of definite location of its said [152] railroad between said points. That it thereupon caused duplicate maps of said location so adopted, together with the field-notes thereon, to be prepared in the manner prescribed by the regulations of the Secretary of the Interior for the preparation of such maps, and thereafter, to wit: March 20, 1907, filed said duplicate maps and field-notes in the

United States District Land Office at Coeur d'Alene City, Idaho. That the register and receiver of said District Land Office immediately thereafter transmitted said maps to the office of the Commissioner of the General Land Office at Washington, D. C. That there was endorsed upon said maps so filed in the District Land Office as aforesaid the affidavit of the Chief Engineer of the said defendant Company, and the certificate of the President of said defendant Company, which affidavit and certificate were as follows, to wit (formal parts and signature omitted):

[Affidavit of Chief Engineer and Certificate of President of Chicago etc. Ry. Co. Endorsed on Maps.]

"E. J. Pearson, being duly sworn, says he is the chief engineer of the Chicago, Milwaukee and St. Paul Railway Company of Idaho; that the survey of the said company's line of railroad described as follows: Beginning at a point on the Idaho-Montana State line distant 66.68 feet N. 20° 25′ W. of the fourth angle post in mile 141 of the survey of said State Line, and running thence S. 56° 38′ W. to a point on the north line of Sec. 35, T. 47 N., R. 6 E., distant 2100 feet west of the northeast corner thereof, said point being station 62+20.2, a distance of 2800 feet traversing unsurveyed lands; thence in a general southerly direction, as per attached typewritten copy of field-notes, along the east side of Cliff Creek, to station 163+87, situate in the NW. ¼, SW. ¼, Sec. 2, T. 46 N., R. 6 E., a distance of 1.92 miles; thence in a general southeasterly direction along the north side of the East Fork of the North

Fork of the St. Joe River to station 381+00, situate in the NE. ¼, NE. ¼, Sec. 18, T. 46 N., R. 7 E., a distance of 4.07 miles; thence in a general northwesterly direction along the south side of said East Fork to station 819+56.2, situate in the NE. ¼, NE. ¼, Sec. 7, T. 46 N., R. 6 E., a distance of 8.29 miles; thence in a general southwesterly direction along said North Fork to station 18+82, situate in the NE. ¼, NE. ¼, Sec. 15, T. 45 N. R. 5 E., a distance of 9.14 miles; thence in a general westerly direction along the north side of the St. Joe River to a point on the west line of Sec. 12, T. 45 N., R. 4 E., distant 635.0 feet north of the southwest corner thereof, said point being station 284+58.0, a distance of 5.75 miles; making a total distance of 29.17 miles traversing surveyed lands, was made under his direction as chief engineer of the company and under its authority, commencing on the 10th day of Nov., 1906, and ending on the 15th day of Feb., 1907; and that the survey of the said line is accurately represented on this map and by the attached typewritten copy of field-notes."

"I, H. R. Williams, do hereby certify that I am president of the Chicago, Milwaukee and St. Paul Railway Company of Idaho; that E. J. Pearson who subscribed to the accompanying affidavit, is [153] the chief engineer of the said company; that the survey of the said railroad, as accurately represented on this map and by the attached typewritten copy of field-notes was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon this map; that

the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the 18th day of March, 1907, as the definite location of the said railroad, described as follows: Beginning at a point on the Idaho Montana State Line distant 66.68 feet N. 20° 25′ W. of the fourth angle post in mile 141 of the survey of said State Line, and running thence S. 56° 38′ W. to a point on the north line of Sec. 35, T. 47 N., R. 6 E., distant 2100 feet west of the northeast corner thereof, said point being station 62+20.2, a distance of 2800 feet, traversing unsurveyed lands; thence in a general southerly direction, as per attached typewritten copy of field-notes, along the east side of Cliff Creek to station 163+87, situate in the NW. ¼, SW. ¼, Sec. 2, T. 46 N., R., 6 E., a distance of 1.02 miles; thence in a general southeasterly direction along the north side of the East Fork of the North Fork of the St. Joe River to station 381+00, situate in the NE. ¼, NE. ¼, Sec. 18, T. 46 N. R., 7 E., a distance of 4.07 miles; thence in a general northwesterly direction along the south side of said East Fork to station 819+56.2, situate in the NE. ¼, NE. ¼, Sec. 7, T. 46 N., R. 6 E., a distance of 8.29 miles; thence in a general southwesterly direction along said North Fork to a station 18+82, situate in the NE. ¼, NE. ¼, Sec. 15, T. 45 N., R. 5 E., a distance of 9.14 miles; thence in a general westerly direction along the north side of the St. Joe River to a point on the west line of Sec. 12, T. 45 E., R. 4 E., distant 635.0 feet north of the southwest corner thereof, said point being station 284+58.0, a distance of 5.75 miles;

making a total distance of 29.17 miles traversing surveyed lands; and that this map has been prepared to be filed in order to obtain the benefits of the act of Congress approved March 3, 1875, entitled 'An Act granting to railroads the right of way through the public lands of the United States.' I further certify that the said railroad is to be operated as a common carrier of freight and passengers."

That said maps had endorsed upon the face of each thereof the following legend, to wit:

"CHICAGO, MILWAUKEE AND ST. PAUL RY. CO. OF IDAHO.

AMENDED MAP SHOWING

Portion of Located Line from Sta. 34+20.2, Idaho Montana State Line to Sta. 284+58 West Line of Section 12, T. 45 N. R. 4 E. Scale: 1 inch=2000 ft.

March 13, 1907.

Officer of Chief Engineer, Seattle, Wash.

Note: All bearings are true bearings.
Red line shows right of way applied for.
Numbers at curve centers refer to curve.
Numbers in separate copy of field-notes."

X.

That thereafter the said defendant Company caused further and additional surveys to be made of its line of road beginning at a point on the Idaho and Montana State Line and extending to a point on the west line of Section 12, in Township 45 N., of Range 4 E., B. M., in Shoshone County, Idaho, and staked out and located [154] a second line of route be-

tween said points, which said line of route differed in certain particulars from the line of route as shown on the said maps filed October 23, 1906, and March 20th, 1907, in the District Land Office at Coeur d'Alene City; that after the survey and location of said line said defendant Company caused a plat thereof to be prepared and on, to wit, May 6, 1907, by a resolution of its board of directors, duly adopted the same as the location of the proposed railway line of said defendant Company between said points. That thereafter the said Company caused duplicate copies of said map, together with the field-notes of such surveys, to be prepared in all respects as required by the regulations prescribed by the secretary of the Interior for the preparation of maps to be filed under the provisions of the act of Congress approved March 3, 1875; and on, to wit, May 10, 1907, it filed said duplicate maps and field-notes in the United States District Land Office at Coeur d'Alene, Idaho; that said maps were received by the said District Land Office and marked "Filed" and transmitted to the office of the Commissioner of the General Land Office at Washington, D. C. That there was endorsed upon said maps at the time of their filing as aforesaid an affidavit of the Chief Engineer of said defendant Company and a certificate by the president of said defendant company, which said affidavit and certificate were as follows, to wit (formal parts and signature omitted):

[Affidavit of Chief Engineer and Certificate of President of Chicago etc. Ry. Co. Endorsed on Maps Showing Definite Location of Said Railroad.]

"E. J. Pearson, being duly sworn, says he is the chief engineer of the Chicago, Milwaukee & St. Paul Railway Company of Idaho; that the amended survey of said Company's line of railroad described as follows: Beginning at a point on the Idaho-Montana State Line distant 66.68 feet N. 20° 12′ W. of the fourth angle post in mile 141 of the survey of said State Line, said point being station 34+20.2, thence S. 56° 38,′ W. to a point on the north line of Sec. 35, T. 47 N., R. 6 E., distant 2100 fee west of the northeast corner thereof, said point being station 62+20.2, a distance of 2800 feet traversing unsurveyed lands; thence in a general southerly direction as per attached typewritten copy of field-notes, along the east side of Cliff Creek to station 168, situate in the NW. ¼, SW. ¼, Sec. 2, T. 46 N., R. 6 E., a distance of 2.0 miles; thence in a general southeasterly direction along the north side of the East Fork of the North Fork of the Saint Joseph River to station 375, situate in the NE. ¼, NE. ¼, Sec. 18, T. 46 N., R. 7 E., a distance of 3.9 miles; thence in a general northwesterly direction along the south side of said East Fork to station 755 situate in the SE. ¼, NE. ¼, Sec. 7, T. 46 N., R. 6 E., a distance of 7.2 miles; thence in a general southwesterly direction [155] along the North Fork to station 15 situate in the SE. ¼, NE. ¼, Sec. 15, T. 45 N., R. 5 E., a distance of 9.1 miles; thence in a general westerly direction

along the North side of said Saint Joseph River to a point on the west line of Sec. 12, T. 45 N., R. 4 E., distant 635 feet north of the southwest corner thereof, said point being station 284+58 a distance of 5.7 miles; making a total distance of 27.9 miles traversing surveyed lands; was made under his direction as chief engineer of the company and under its authority, commencing on the 10th day of Nov. 1906, and ending on the 20th day of April, 1907; and that the amended survey of the said line is accurately represented on this map and by the accompanying field-notes.

"I, H. R. Williams, do hereby certify that I am President of the Chicago, Milwaukee and St. Paul Railway Company of Idaho; that E. J. Pearson, who subscribed the accompanying affidavit, is the chief engineer of the said company; that the survey of the said railroad, as accurately represented on this map and by the accompanying typewritten copy of field-notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon this map; that the said survey as represented on this map and by the said field-notes was adopted by resolution of its board of directors on the 6th day of May, 1907, as the amended definite location of said railroad, described as follows: Beginning at a point on the Idaho-Montana State Line distant 66.68 feet N. 20° 12′ W. of the fourth angle post in mile 141 of the survey of said state line, said point being station 34+20.2; thence S. 56° 38′ W. to a point on the north line of Sec. 35,

T. 47 N., R. 6 E., distant 2100 feet west of the northeast corner thereof, said point being station 62+20.2, a distance of 2800 feet traversing unsurveyed lands; thence in a general southerly direction, as per attached typewritten copy of field-notes, along the east side of Cliff Creek to station 168 situate in the NW. ¼, SW. ¼, Sec. 2, T. 46 N., R. 6 E., a distance of 2.0 miles; thence in a general southeasterly direction along the north side of the East Fork of the North Fork of the Saint Joseph River to station 375 situate in the NE. ¼, NE. ¼, Sec. 18, T. 46 N., R. 7 E., a distance of 3.9 miles; thence in a general northwesterly direction along the south side of said East Fork to station 755 situate in the SE. ¼, NE. ¼, Sec. 7, T. 46 N., R. 6 E., a distance of 7.2 miles; thence in a general southwesterly direction along said North Fork to station 15 situate in the SE. ¼, NE. ¼, Sec. 15, T. 45 N., R. 5 E., a distance of 9.1 miles; thence in a general westerly direction along the north side of said Saint Joseph River to a point on the west line of Sec. 12, T. 45 N., R. 4 E., distant 635 feet north of the southwest corner thereof, said point being station 284+58, a distance of 5.7 miles; making a total distance of 27.9 miles traversing surveyed lands; and that this map has been prepared to be filed in order to obtain the benefits of the Act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States,' I further certify that the said railroad is to be operated as a common carrier of freight and passengers."

That there was also endorsed upon the face of said map the following legend, to wit:

"CHICAGO, MILWAUKEE AND ST. PAUL RY. CO. OF IDAHO.

AMENDED MAP SHOWING PORTION OF LOCATED LINE.

From Sta. 34+20.2 Idaho-Montana State Line to Sta. 284+58.0 west line of Section 12, T. N. R. 4 E.

Scale 1 inch=2000 ft.

May 2nd, 1907.

Office of Chief Engineer, Seattle, Wash.

Note: All bearings are true bearings. [156]

Red line shows right of way applied for.

Numbers at curve centers refer to curve.

Numbers in separate copy of field-notes."

XI.

That the map attached to the bill of complaint herein as Exhibit "A" is a copy of the map filed in the said United States District Land Office October 23, 1906, and that the map marked Exhibit "B" attached to the bill of complaint herein is a copy of map filed in the United States District Land Office May 10th, 1907, as aforesaid. That the plat marked Exhibit "X" and hereby referred to and made a part of this stipulation (although for convenience of reference the same is not hereunto attached) correctly shows the location of the respective routes located and adopted by said defendant Railway Company and shown upon the maps filed in the office of the United States District Land Office as aforesaid, both with respect to the United States townships and

sectional surveys, the St. Joe River, and with respect to each other.

That at the time when the said map of March 20, 1907, was filed in the District Land Office as aforesaid there had been no approval of the map filed October 23, 1906, save and except as hereinbefore set forth.

That at the time when the said map of May 10, 1907, was filed in the United States District Land Office as aforesaid there had been no approval of the said map filed October 23d, 1906, or of the said map filed March 20, 1907, save and except as hereinbefore set forth.

That at the time each of said sets of maps were filed in the United States District Land Office as aforesaid there was filed therewith copies of the field-notes of the surveys of said route prepared in the manner prescribed by the regulations of the Secretary of the Interior regulating the manner of preparation and filing of field-notes accompanying maps filed under the provisions of the Act of Congress approved March 3, 1875. [157]

That after the filing of said maps of May 10th, 1907, the Commissioner of the General Land Office returned to the United States Land Office at Coeur d'Alene City, Idaho, the said maps and field-notes which had been filed October 23, 1906, and March 20, 1907, and thereafter, to wit, June 25, 1907, the register of the United States District Land Office at Coeur d'Alene City, Idaho, returned said maps to the said defendant Railway Company, together with the fol-

lowing letter of transmittal, to wit (formal parts and signature omitted):

[Letter, Dated June 25, 1907, Register U. S. District Land Office at Coeur d'Alene City to Chicago etc. Ry. Co.]

"In accordance with instructions contained in Commissioner's letters of May 24th and June 6th I return two maps and field-notes of the survey of your line from the Idaho-Montana Summit to Sec. 12, Tp. 45 N. R. 4 E., B. M., a later map of the same section having been filed, which the Commissioner says is apparently intended to supersede the former."

XI½.

That on January 2, 1907, C. W. Woodruff, the Chief Law Officer of the Forest Service, transmitted to Messrs. Dudley & Mishener, attorneys for the said defendant railway company, the following letter, to wit (formal parts and signature omitted):

[Letter, Dated January 2, 1907, Chief Law Officer of Forest Service to Attorneys for Chicago etc. Ry. Co.]

"In reference to General Dudley's inquiry concerning the practice of the Department of the Interior and the Department of Agriculture in dealing with railroad maps of right of way filed, but not approved, before the creation of a reserve, I report as follows:

In the comity between the Departments, the Secretary of the Interior calls upon the Secretary of Agriculture to consider right of way applications over

lands embraced within temporary withdrawals for forest reserve purposes, and if the forest reserve is created before the maps of location are approved, the Secretary of Agriculture has the right to secure such stipulations for the protection of the forest reserves as he deems necessary before returning the maps with his approval.

This is the situation in the case of the Chicago, Milwaukee & St. Paul Railway Company, and its right of way in the Coeur d'Alene Forest Reserve. The maps of location were not referred to the Forester for report until after the reserve was created, and he will be obliged to require a stipulation for the Coeur d'Alene similar to that now being negotiated for the Helena Forest Reserve."

XII.

That May 10th, 1907, George R. Peck, as General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho, filed with the United States Department of Agriculture Forest Service a paper writing as follows, to wit: [158]

[Writing, Filed May 10, 1907, by General Counsel Chicago etc. Ry. Co. with U. S. Department of Agricultural Forest Service.]

UNITED STATES DEPARTMENT OF AGRICULTURE.

FOREST SERVICE.

Chicago, Milwaukee & St. Paul Railway Company of Idaho,—Railroad—(Interior) Coeur d'Alene National Forest, Idaho.

"WHEREAS, The Chicago, Milwaukee and St. Paul Railway Company of Idaho desires immediate

permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the Company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana." Date May 10, 1907. Signed Geo. R. Peck, General Counsel for the Chicago, Milwaukee and St. Paul Railway Company of Idaho.

And thereupon the United States Acting Forester made upon said paper writing the following indorsements, to wit:

[Endorsement Made by U. S. Acting Forester on Writing Filed May 10, 1907, by General Counsel Chicago etc. Ry. Co.]

"Approved and advance permission given to construct, subject to ratification hereof by the Company.

Date: May 10, 1907.

JAMES B. ADAMS,
Acting Forester."

That thereupon on May 10, 1907, G. F. Pollock, Chief of the office of Lands of the Forest Service in the United States Department of Agriculture, transmitted to Richard H. Rutledge, Forest Supervisor of the Coeur d'Alene National Forest, the following telegram, to wit (formal parts and signature omitted):

[Telegram, Dated May 10, 1907, Pollock to Rutledge.]

"Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows.

POLLOCK."

And on May 11, 1907, said Pollock transmitted to said Rutledge the following letter, to wit (formal parts and signature omitted):

[Letter, Dated May 11, 1907, Pollock to Rutledge.]

"The following telegram in this case was sent to you to-day: 'Advance permission given to-day St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows.'

A blue-print showing the route has been sent to you under separate cover. Enclosed with this letter is a copy of the preliminary stipulation entered into to-day at this office with Mr. Geo. R. Peck, General Counsel for the road. There is also enclosed a copy of the stipulation executed by the Company in respect to its road through the Helena National Forest. The stipulation to be executed by the Company in this case will be as nearly as practicable like that executed in the Helena case.

Please examine carefully the enclosed copy of the Helena stipulation and at the earliest practicable date submit your report on Form 964, giving par-

ticular attention to the question of the width necessary to be cleared in order to protect the forest from fire.

By separate letters, you will be fully instructed in regard to the cutting and payment for timber, and how to prepare your part of the report affecting the timber."

XIII.

That the Chicago, Milwaukee & St. Paul Railway Company of [159] Montana was and is a corporation organized and existing under the laws of the State of Montana for the purpose of constructing, maintaining and operating a railroad as a common carrier in said State. That said corporation was so created and organized in the month of December, 1905.

That the president of the United States by a proclamation dated April 12, 1906, set apart and created a reservation for forest purposes of certain public lands in the State of Montana, which said reservation was designated as "The Helena Reserve."

That thereafter, to wit, in the month of August, 1906, the said Chicago, Milwaukee & St. Paul Railway Company of Montana for the purpose of obtaining the benefit of the grants made by the Act of Congress approved March 3, 1875, filed in the office of the Secretary of the Interior of the United States, a certified copy of its articles of incorporation, proofs of its organization and all other papers required to be filed in the office of the said Secretary under the regulations of the Secretary of the Interior as here-

inbefore set out in paragraphs I and II of this stipulation.

That, to wit, on or about August 23, 1906, the said Chicago, Milwaukee & St. Paul Railway Company of Montana filed with the register of the United States District Land Office for the District of Lands for sale and disposal at Helena, Montana, in which land district the said Helena Forest Reserve was situated, duplicate maps or profiles of its road. That thereupon the officers of the United States Department of Agriculture and of the Interior Department of the United States required the said Chicago, Milwaukee & St. Paul Railway Company of Montana to execute and the said Railway Company did execute, for the purpose of obtaining the approval by the Secretary of the Interior of the maps of its said road through the Helena Forest Reserve, a certain stipulation which said stipulation is in words and figures following, to wit: [160]

[Stipulation Between Chicago etc. Ry. Co. and Price, Associate Forester.]

UNITED STATES DEPARTMENT OF AGRICULTURE.

FOREST SERVICE.

"Chicago, Milwaukee & St. Paul Railway Company of Montana—Application for Right of Way—Helena Forest Reserve.

WHEREAS, a part of the proposed railroad right of way of the Chicago, Milwaukee & St. Paul Railway Company of Montana (hereinafter designated as 'the company'), as shown by a certain map of lo-

cation filed by the Company in the Department of the Interior on August 23, 1906, under the Acts of March 3, 1875, and March 3, 1899, (said right of way being two hundred (200) feet in width), will be located within the Helena Forest Reserve, Montana, and

WHEREAS, by an amendatory regulation of the United States Department of the Interior, approved by the Secretary of the Interior on April 25, 1906, concerning rights of way for railroads, canals, reservoirs, etc., it is provided that:

'Whenever a right of way is located upon a forest or timberland reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserve,' and

WHEREAS, the Secretary of Agriculture requires, for the protection of said Helena Forest Reserve, that the Company shall enter into the stipulation hereinafter set forth, and

WHEREAS, the Secretary of Agriculture, in order to protect the said forest reserve from fire, requires the Company to clear and keep clear a strip of land one hundred and fifty (150) feet wide on each side of its right of way, except as hereinafter provided, and permits the Company to use or sell the timber on said right of way and additional strips, upon payment as provided in Clause 2 hereof;

NOW, THEREFORE, the ~~Secretary~~ Company, in consideration of the premises, does hereby stipulate, agree and bind itself, its successors and assigns, as follows, to wit:

Clause 1. To clear and keep clear of all timber and other inflammable substance, all said right of way and all other land controlled by the Company as a right of way, however acquired between the points where the center line of said railway intersects the exterior boundary lines of said reserve, and all land of said forest reserve lying within two hundred and fifty (250) feet of said center line and being contiguous to said right of way; except such land as the Forester may specifically exclude in writing from the operation of this clause, as for example when a stream, the right of way of another company, or other adequate firebreak lies between the right of way of the Company and the said forest reserve; to dispose of all brush and other refuse in such clearing as required by the forest officer in charge; to cut all trees, when physically possible, so that they fall entirely within the strip to be cleared under this clause; and so far as is practicable to pile no timber or wood less than one hundred (100) feet from the edge of the forest reserve.

Clause 2. To pay, to the Special Fiscal Agent, Forest Service, Washington, D. C., when requested by the Forester, for timber and wood, within said right of way and the additional strips referred to in Clause 1 hereof, which at the time of cutting belongs to the United States, such lump sum as may be mutually agreed upon, or at the rate of one dollar ($1) per cord for wood, and three dollars ($3) per thousand feet board measure for usable or merchantable timber as scaled by the Scribner rule [161] Decimal C by the Forest Officer in charge, and in case of

dispute the decision of the Forester shall be final, except that in lieu of the payments provided above the Company may pile separately in compact piles and with all limbs lopped off, and leave for disposal by the Forest Service, any timber or wood which the Company does not wish to use or sell; to transport such timber and wood if sold by the Forester, at the established freight rates; and to put in a side track sufficient to handle timber and wood sold, from said forest reserve.

Clause 3. To construct and maintain in good and passable condition across said right of way, free of any charge or expense to the United States, crossings for all such now existing roads and trails intersected by the Company's railroad within said forest reserve as may be mutually agreed upon as necessary and practicable.

Clause 4. The company and all contractors and others employed by the Company, shall observe such reasonable precautions against fire as the Forester may prescribe (but this shall not be construed as authorizing the Forester to require the company to use oil as fuel in its locomotives), and shall at all times exercise the utmost care to prevent fires, and shall promptly and without charge give all reasonably possible assistance in men and material under the direction of the forest officer in charge, to fight fire within said reserve adjacent to said right of way.

Clause 5. To pay to the United States, through the Special Fiscal Agent, Forest Service, for any and all damage caused by fires, or otherwise sustained by the United States by reason of the use and occu-

pation of said forest reserve by the Company, its successors and assigns; and it is agreed by the parties hereto that if any damage shall occur to the forest reserve lands by fires started by the Company on other land, the liability of the Company for such damages shall be determined by the laws of the State of Montana or the United States, if applicable thereto.

Clause 6. To make any assignment or transfer of its right of way through said reserve expressly subject to the fulfillment of all the conditions herein contained by the assignee or transferee.

IN WITNESS WHEREOF, said corporation has caused these presents to be executed, and its corporate seal to be hereto affixed, at its office in Milwaukee, Wis., on this eighteenth day of January, 1907, by its President and Agent hereto duly authorized.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF MONTANA.

[Seal] By E. D. SEWALL,
President.

Attest: E. W. ADAMS,
Assistant Secretary.

Approved January 24, 1907.
OVERTON W. PRICE,
Associate Forester."

That said stipulation is the stipulation which was referred to in the paper writing signed and filed by George R. Peck May 10, 1907, and hereinbefore set forth as the stipulation and conditions "executed by

the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

XIV.

That October 24, 1907, the Chief of the Office of Lands of the Forest Service in the United States Department of Agriculture transmitted to Richard H. Rutledge, Forest Supervisor of the Coeur d'Alene National Forest, a certain form of stipulation to be [162] executed by the said defendant company with the following letter of transmittal, to wit (formal parts and signature omitted):

[Letter, Dated October 24, 1907, Chief Office of Lands of Forest Service etc. to Rutledge.]

"Please forward the enclosed form of stipulation to the Company for execution. One of the carbon copies may be retained by you for your files and the other by the Company.

When the stipulation is properly executed, it should be returned to you to be forwarded to the Forester. Please fill in your copy to show dates, signatures, etc. The person signing the stipulation for the Company should show authority to do so in the manner indicated by the enclosed memorandum.

When the stipulation is properly executed and received by the Forester a favorable report will be made to the Department of the Interior on the application, unless some unforeseen objection should arise.

Please send the enclosed carbon copy of this letter to the Company."

That said stipulation was in words and figures following, to wit, and is that certain stipulation, a copy of which is attached to the complaint herein as Exhibit "G":

[Stipulation—Exhibit "G" to Complaint.]

UNITED STATES DEPARTMENT OF AGRICULTURE.

FOREST SERVICE.

"Chicago, Milwaukee & St. Paul Ry. Co. of Idaho. Application for Right of Way Coeur d'Alene Nat'l Forest.

WHEREAS, a part of the proposed railroad right of way of the Chicago, Milwaukee and St. Paul Railway Company of Idaho (hereinafter designated as 'the Company'), as shown by a certain map of location filed by the Company in the Department of the Interior on March 20, 1907, under the Act of March 3, 1875, will be located within the Coeur d'Alene National Forest, Idaho; and

WHEREAS, the regulations of the United States Department of the Interior concerning rights of way for railroads, reservoirs, canals, etc., provide that whenever such rights of way are located upon National Forests, the applicant must enter into such stipulations and execute such bonds as the Secretary of Agriculture may require for the protection of the National Forests; and

WHEREAS, the Secretary of Agriculture requires for the protection of said Coeur d'Alene National Forest that the Company shall enter into the stipulation hereinafter set forth;

NOW, THEREFORE, the Company does hereby stipulate and agree, and does bind itself, its successors and assigns, as follows, to wit:

1. To clear and keep clear of all timber and other inflammable substance all of said right of way and all other lands controlled by the Company as a right of way, however acquired, between the points where the center line of said right of way intersects the exterior boundary lines of said Forest, and all lands in said Forest lying within 200 feet of said center line on the uphill side of said center line, and being contiguous to said right of way; but the Forester may in writing, specifically exclude from the operation of this Clause, such lands as he deems proper, as for example, when a stream, the right of way of another Company, or other adequate fire brake lies between the right of way of the Company and the said Forest to dispose of all brush and other refuse in such clearings as required by the forest officer [163] in charge; to cut all trees when physically possible so that they fall entirely within the strip to be cleared under this clause; to remove all timber that when cut on the strip to be cleared may fall without the strip.

2. To pay to the Fiscal Agent, Forest Service, at Washington, D. C., for all timber to be cut within said right of way and within the additional strip referred to in Clause 1 hereof, which at the time of cutting belongs to the United States, between the east boundary of said Forest and the north side of Section 15, Township 45 North, Range 5 East, the lump sum of $27,906.90, such payment being at the

rate of $4 per thousand feet B. M. for the saw timber to be cut.

3. To pay to the said Fiscal Agent of the Forest Service, when requested by the Forest Officer in charge, for all timber cut within that part of said right of way and the additional strip to be cleared, referred to in Clause 1 hereof, which lies in approximately Secs. 15, 16, 17, 18 and 7, Township 45 North, Range 5 East, and Sec. 12, Township 45 North, Range 4 East, which at the time of cutting is the property of the United States, at the rate of $4 per thousand feet B. M. log scale, for all usable or merchantable timber cut or destroyed including dead timber standing and down, on National Forest land and invalid claims in the occupancy of this right of way, according to the scale of the Forest Officers.

Logs will be scaled according to the Scribner rule, Decimal C, by the Forest Officer in charge, and in case of a dispute, the decision of the Forester will be final.

Logs will be decked or skidded for scaling, and no logs shall be removed from National Forest land until scaled by a Forest Officer. Logs will be scaled at least every seven days.

The minimum diameter limit to which logs are to be scaled is 6 inches. Logs over 16 feet in length will be scaled as 2 or more logs, and pieces of timber less than 6 feet in length which contain lumber of any merchantable grade will be scaled as being 6 feet in length.

All tops, lops, and other refuse, including unmerchantable timber of every description, will be dis-

posed of at such times and in such manner as may be required by the Forest Officer in charge.

4. To cut no timber outside of said right of way and additional strip so referred to in Clause 1 hereof, except by special permit in accordance with the rules and regulations.

5. To construct and maintain in good and passable condition across said right of way, free of any charge or expense to the United States, crossings for all such now existing roads and trails intersected by the Company's railroad within said National Forest as may be mutually agreed upon as necessary and practicable.

6. The Company, its employees, contractors, and employees of contractors shall, both independently and at the request of the Forest Officers, do all in their power to prevent and suppress fires (but this shall not be considered as authorizing the Forester to require the Company to use oil as fuel in its locomotives).

7. To pay to the United States, through the Fiscal Agent, Forest Service, at Washington, D. C., for any and all damage, caused by fires or otherwise sustained by the United States by reason of the use and occupation of said National Forest by the Company, its successors and assigns; and it is agreed by the parties hereto that if any damage shall occur to the National Forest lands by fires started by the Company on other land, the liability of the Company for such damage shall be determined by the laws of the State of Idaho or the United States, if applicable thereto. **[164]**

8. The Company hereby gives permission to the Forest Service of the United States to install and maintain telephone instruments in the railroad stations in said National Forest; and also agrees to furnish pin room on its poles along said right of way, and to permit the Forest Service to string its telephone wires upon the Company's poles; train crews shall notify station agents of fires and of their direction and distance from the station by the quickest practicable method. And the station agents of the Company shall notify the Forest Officers by means of such telephones of fires within said National Forest coming to their knowledge.

If thereafter the Forest Service shall, with the co-operation of the officials of railway companies of the United States operating railroads in National Forests, secure the adoption of a code or system of signals from locomotives, to give information to station agents of fires, then the railway Company agrees to adopt and put into effect such code or system.

9. No person undergoing a sentence of imprisonment at hard labor shall be employed in any construction or other work upon this right of way. (See Executive Order May 18, 1905.)

10. To make any assignment of transfer of its right of way through said National Forest expressly subject to the fulfillment of all the conditions herein contained by the assignee or transferee.

IN WITNESS WHEREOF said corporation has caused these presents to be executed, and its corporate seal to be hereto affixed at ..... on this ....

day of ....., 1907, by its President and Agent hereto duly authorized.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO.

By .....,

(Its President.)

[Corporate Sea

Attest: ....."

That thereafter said stipulation and the copy of said letter was delivered by the said Forest Supervisor to the said Defendant Company; and that, to wit, on or about November 15th, 1907, the said Company informed the said Forest Supervisor, Mr. Rutledge, that they would not sign such stipulation but would await the outcome of certain negotiations which were pending at Washington, D. C., with the officers of the Interior Department and of the Department of Agriculture of the United States.

XV.

That, to wit, December 2, A. D. 1907, George R. Peck, General Counsel for the Chicago, Milwaukee & St. Paul Railway, acting on behalf of the said defendant company, called upon the Forester of the United States Department of Agriculture at Washington, D. C., and then and there told such officer that he, the said Peck, was not authorized to make any different agreement in respect to the defendants [165] right of way through the Coeur d'Alene National Forest than that which had been made for the right of way of the Chicago, Milwauke & St. Paul Railway Co. of Washington through the Yakima National Forest; and at said time the said

Peck requested of the officers of the United States Forestry Service some assurance that the said defendant company should not be disturbed in the work of constructing its said railway through the said Coeur d'Alene National Forest. That, pursuant to said request, Associate Forester Price on, to wit, Dec. 2, 1907, sent to the said Richard H. Rutledge, Forest Supervisor of the said Coeur d'Alene National Forest, the following telegram, to wit:

[Telegram, Dated December 2, 1907, Price to Rutledge.]

Washington, D. C., Dec. 2, 1907.

"Chicago, Milwaukee & St. Paul claims right to construct without stipulation and without paying for timber destroyed. While negotiations are pending allow construction to proceed. Friendly suit probable. Letter follows.

PRICE."

That, to wit, on said December 2, 1907, Philip P. Wells, Law Officer of the Forestry Service in the United States Department of Agriculture prepared and caused to be transmitted to the said George R. Peck the following memorandum, to wit:

[Memorandum, Dated December 2, 1907, Law Officer Forestry Service to General Counsel Chicago etc. Ry. Co.]

"December 2, 1907.

'C. M. & St. Paul Ry. Co.—Railroad (Interior)—3/20/07—Coeur d'Alene.

MEMORANDUM FOR SPECIAL USES:

Mr. George R. Peck, general counsel for this railroad, has today conferred with the Forester and with

the Assistant Attorney General for the Department of the Interior claiming that the railroad ought not to be required to file any stipulation whatever. The following telegram was sent to Supervisor Rutledge today:

> 'Chicago, Milwaukee and Saint Paul claims right to construct without stipulation and without paying for timber destroyed. While negotiations are pending allow construction to proceed. Friendly suit probable. Letter follows.'

Mr. Peck contends that this case should follow the precedent set in the case of a right of way of the same railroad in the Wenatchee Division of the Washington Forest. The Forest Service insists that the cases are different. In the Wenatchee the railroad filed its maps while the land was under withdrawal. It was required by the General Land Office to file a stipulation and bond for the protection of the prospective forest, it was later required to amend its maps to avoid conflict with a project of the Reclamation Service, still later the proclamation reserving the land for a National Forest was issued, and after that the railroad began construction. No demand was made by the Forest Service upon the railroad for a stipulation until construction was in progress along the whole line, and the right of way [166] cleared through the Forest. In this state of affairs the railroad claimed that its rights had vested before the proclamation issued, and the Forester has consented to compromise the case by requiring the railroad to make the clearing necessary to protect the Forest without paying for the timber

destroyed in such clearing or on the right of way.

In the Coeur d'Alene case, however, the facts are different. The railroad's maps were filed October 23, 1906, while the land was under withdrawal; proclamation issued November 6, 1906 on March 20 the railroad filed an amended map shifting a part of its line to another fork of the river, and on May 10 amended its map still further. The railroad contends that its rights relate back to the date of filing of its original map, and since at that time the land was under withdrawal and proclamation had not issued that the land was not a forest reserve within the meaning of the Act of March 3, 1899 (Use Book p. 183), and consequently that the railroad got its right of way as of that date, under the Act of March 3, 1875 (Use Book p. 180), and cannot be required to file a stipulation and bond under the regulation of April 25, 1906 (Use Book p. 227). The Service contends:

(a) That land under withdrawal is a forest reservation within the meaning of the Act of 1899, and therefore that the regulation of April 25, 1906, applies to it;

(b) Even if land withdrawn for a National Forest is not a 'forest reservation' within the meaning of the Act of 1899, and therefore is not subject to the regulation of April 25, 1906, nevertheless in this case since the railroad voluntarily amended its lines and changed its proposed location after the proclamation issued, its application must be treated as of that date (March 20, 1907) and not as of the date when the original map was filed. Therefore the

Government can exact a stipulation under the Act of 1899 and the regulation of April 25, 1906.

The railroad desires a compromise similar to that agreed to in the Wenatchee case. The Service will take one of two courses (1) compromise upon terms to be agreed to hereafter or (2) submit the case to the courts upon an agreed statement of facts, both parties to abide the result.

Therefore the construction work of the railroad should not be interfered with while negotiations are pending, notwithstanding its refusal to execute the stipulation submitted to it before this dispute arose. The Service should reach a prompt decision as to which course to pursue and keep the officers in the field fully advised of the situation.

Please send a copy of this memorandum to the Chief Inspector and to the Supervisor and to Mr. Peck.

PHILIP P. WELLS,
Law Officer."

XVI.

That August 14, 1908, the Acting Secretary of the Interior transmitted to the attorneys for the said defendant company in Washington, D. C., the following letter, to wit (formal parts and signature omitted):

[Letter, Dated August 14, 1908, Acting Secretary of Interior to Attorneys Chicago etc. Ry. Co. of Idaho.]

"I am in receipt of a letter dated August 4, 1908, from the Acting Secretary of Agriculture, stating that the Chicago, Milwaukee and St. Paul Railway

Company of Idaho has refused to execute a certain stipulation required by said Department as a condition precedent to the approval, under the provisions of the act of March 3, 1875 (18 Stat. 482), of a certain map filed by said company in the Coeur d'Alene land office, Idaho, showing the definite [167] location of a portion of its line of road in the Coeur d'Alene National Forest, and requesting me to notify the company that I

> 'believe the requirements of the stipulation to be reasonable and necessary for the protection of public interests, and that you (1) cannot approve its map until the stipulation has been executed.'

As you may know, the regulations of this Department governing applications for railroad rights of way require that—

> 'Whenever a right of way is located upon a forest or timber-land reserve the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves.' Amendatory Circular of April 25, 1906 (34 L. D. 583.)

In accordance with the agreement made by and between said department and this Department, and following the established practice in such cases, you are now advised that this Department will not approve the company's said map under the provisions of said act of March 3, 1875, until a favorable report thereon is made by the Department of Agriculture."

XVII.

That October 10th, 1908, the Secretary of the In-

terior transmitted to Messrs. Dudley and Michener, attorneys for the defendant company, the following letter, to wit (formal parts and signature omitted):

[Letter, Dated October 10, 1908, Secretary of Interior to Attorneys Chicago etc. Ry. Co. of Idaho.]

"Referring to departmental letter of August 14, last, advising you that this Department would not approve the map of location filed under the act of March 3, 1875, by the Chicago, Milwaukee and St. Paul Railway Company, of Idaho, across the Coeur d'Alene National Forest, until the stipulation exacted by the Department of Agriculture to protect the National Forest and the interests of the public, had been duly executed and filed, which notice was called forth by the refusal of said company to file said stipulation, I have now to advise you that the matter has been further considered in a letter this day addressed to the Secretary of Agriculture, copy of which is enclosed, and you are hereby notified that unless the stipulation is duly executed and filed within fifteen days from the date of this letter, the surveys and plats which are hereby held for rejection, will be rejected and stricken from the files of this Department."

That enclosed with said letter was a copy of a letter dated October 10, 1908, transmitted by the Secretary of the Interior to the Secretary of Agriculture, which said copy is in words and figures following, to wit (formal parts and signature omitted):

[Letter, Dated October 10, 1908, Secretary of Interior to Secretary of Agriculture.]

"I have your letter of the 29th ultimo referring to your letter of August 4, last, and the departmental letter responding thereto, dated August 14 last, all relating to the failure of the Chicago, Milwaukee and St. Paul Railway Company of Idaho, to execute and file, as required by your Department, for the protection [168] of the natural forests, a stipulation precedent to the filing and approval by this Department of said company's map of location across the Coeur d'Alene National Forest in the State of Idaho, which purports to be an amendment of a former map filed October 23, 1906.

Acting upon your request that the company's resident counsel be advised that said map of location within the forest will not be approved until a favorable report has been received from your Department, Messrs. Dudley & Michener, were under date of August 14, last, advised 'that this Department will not approve the Company's map under the provisions of the act of March 3, 1875, until a favorable report is made thereon by the Department of Agriculture.' In the departmental letter of same date to your Department it was said: 'I have refrained from expressing an opinion as to the reasonableness or necessity of the stipulation required by your Department, believing that it is not within the province of this Department to do so.' Upon further consideration of the stipulation I have decided and so declare that in my judgment the

public interests will be injuriously affected unless the stipulation in question is executed and filed by the company and for that reason I have this day furnished counsel for the company with a copy of this letter, and advised them that unless the stipulation required is duly executed and filed within fifteen days from this date, the surveys and plats of the company's right of way within the Coeur d'Alene National Forest, which are hereby held for rejection, will be rejected and stricken from the files of this Department."

That thereafter, to wit, October 29th, 1908, the Acting Secretary of the Interior transmitted to Messrs. Dudley and Michener, Attorneys for the said defendant Railway Company, the following letter, to wit (formal parts and signatures omitted):

[Letter, Dated October 29, 1908, Acting Secretary of Interior to Attorneys Chicago etc. Ry. Co. of Idaho.]

"On October 10, 1908, after referring to previous correspondence relative to the application of the Chicago, Milwaukee and St. Paul Railway Company of Idaho, for right of way under the act of March 3, 1875 (18 Stat. 482), through the Coeur d'Alene National Forest, you were advised that unless the stipulation required by the Department of Agriculture for the protection of the National Forest should be executed and filed within fifteen days from that date that the surveys and plats would be rejected and stricken from the files of this Department.

The stipulation has not been filed, and the time allowed therefor having expired, the application is

hereby rejected, the map and papers are stricken from the files of this Department and are herewith enclosed."

That at the time of writing said letter the said Secretary of the Interior ordered that the maps filed by the said defendant Company May 10, 1907, as aforesaid be stricken from the files and returned the same, together with said letter, to the said attorneys for the defendant Company.

That no map, profile, survey or plat of the defendant's railroad other than as hereinbefore set forth and mentioned was ever **[169]** filed or approved by the Secretary of the Interior. That the Secretary of the Interior refused to approve said map filed May 10th, 1907, and struck the same from the files of the Interior Department of the United States for the reasons expressed in the letters of the Secretary of the Interior dated October 10th, 1908, and the letter of the Acting Secretary of the Interior dated October 29, 1908, hereinbefore set forth in this paragraph.

XVIII.

That the said defendant railway company began the work of construction of that portion of its said railroad extending through the said Coeur d'Alene National Forest Reserve, on or about July 10, 1907, and thereafter continued in the performance of said work of constructing said railroad until on or about July 31, 1909, when the same was completed. That prior to December 3, 1907, the said defendant Railway Company had expended in the construction of its said railway, over and across said forest reserve,

approximately $523,000.00; that it expended in the entire construction of said work, and prior to July 31, 1909, approximately $4,800,000.00; that the grading and track laying of its said railway line, through said forest reserve, was completed on or about December 1, 1908; and that the moneys expended in the construction of said work by said company, through said forest reserve, up to said December 1, 1908, was approximately $3,873,813.62.

XIX.

That March 9th, 1908, William L. Hall, Acting Forester in the United States Department of Agriculture, transmitted to George R. Peck the following letter, to wit (formal parts and signature omitted):

[Letter, Dated March 9, 1908, Hall, Acting Forester to Peck, Counsel, Chicago etc. Ry. Co. of Idaho.]

"I understand that from the beginning of the negotiations in this case your Company has offered no objection to clearing the right of way and an additional strip of 100 feet wherever such clearing is necessary in the judgment of the Forest Officer in charge. As you know, the timber from only a part of the right of way is being cut at the present time, and the brush and debris from this cutting is not being cleared up. I believe that it would be exceedingly advantageous both to the railroad Company and to the Forest Service if pending the settlement of the proposed [170] suit an agreement could be reached providing for the cutting promptly of timber on the above mentioned area and the proper disposal of brush. You will agree, I am sure, that such an agreement would aid materially in

straightening out the situation on the ground. As the matter stands at present, neither the Forest officers nor the local officers of the Railroad Company know just what is required as to the clearing. I shall be very glad to hear from you as soon as possible."

That in reply thereto, to wit, March 17th, 1908, the said George R. Peck transmitted to the said William L. Hall the following letter to wit (formal parts and signature omitted):

[Letter, Dated March 17, 1908, Peck to Hall.]

"Your letter of the 9th instant, relative to right of way through the Coeur d'Alene Forest Reserve, reached me yesterday morning on my return from a southern trip. I am expecting to be in Washington in a few days, probably this week, and will call at your office to take up the subject with you personally.

The only objection I could have to making the agreement which you suggest grows out of the legal position which our Company would necessarily take in the friendly suit. That is to say, our theory in the litigation must necessarily be that our rights are based on the Act of March 3rd, 1875, and are not affected by the establishment of the Forest Reserve. If our contention should be sustained, I suppose we could not be required to clear the right of way at all. It is certainly important that the matter be disposed of at an early date, and I will do everything possible to that end."

That April 27th, 1908, Philip P. Wells, Law

Officer in the office of the Forester of the United States Department of Agriculture, transmitted to the said George R. Peck the following letter, to wit (formal parts and signature omitted):

[Letter, Dated April 27, 1908, Wells to Peck.]

"You recently informed me in my office that the compromise in the above named matter agreed upon at the conference on February 11th had been disapproved by Mr. Field, (you had agreed to it subject to his approval) and that you desired to refer to the courts by friendly suit the question of the right of the Forest Service to require any stipulation as a condition precedent to the approval of your right of way application. The legal questions to be decided are set forth in my memorandum of December 2, 1907, two copies of which I gave you. In accordance with our conversation I will, as soon as the pressure of other work admits, prepare and submit to you for your inspection the draft of a bill in equity to be used as the basis of such a suit.

If this suit is to be conducted as a friendly one and the Forester is not to seek injunction *pendente lite* or otherwise object to or resist your occupation of the Forest pending the outcome of the litigation, I think that fairness requires that some friendly consideration be in turn shown the Forest Service. The Forest Officers report that very little has been done toward clearing the right of way as construction proceeds; that tops, brush and other debris has accumulated and menace the surrounding [171] Forests. The danger of fire threatens loss of to your Company as well as to the Forest Service.

I request, therefore, that the matter of clearing the right of way of inflammable material be taken up with this office at an early date with a view to arranging the terms of an agreement under which such clearing shall be begun at once and be made to keep pace with the construction work. This protection is not only reasonable and little more than is given under the Act of the Idaho Legislature, approved February 15th, 1907 (Session Laws 1907, p. 18), but is, perhaps, necessary in order to save from fire some of the Forest Service timber, for the destruction of which your Company would be no doubt answerable in damages. I feel confident that the fairness of my request in this case will appeal to you and that your Company will readily comply with it."

That May 15th, 1908, Mr. George R. Peck transmitted to Mr. Wells the following letter, to wit (formal parts and signature omitted):

[Letter, Dated May 15, 1908, Peck to Wells.]

"On my return to Chicago three days ago I found your letter of the 27th ultimo, which you had mentioned to me while I was in Washington. I have sent it to Mr. Field, our General Counsel at Seattle, and I will ask him to immediately confer with our executive people there and ask them to take up the subject at once with the Forest Service. I am surprised to learn that the forest officers report 'that very little has been done toward clearing the right of way as construction proceeds; that tops, brush and other debris has accumulated and menace the surrounding forests.' This is already directly contrary to what Judge Flewelling told me. Judge Flewelling was with me, I

believe, when I called at your office, and I have an impression that you were present when he made this statement, but this may not be correct. However, he certainly did repeat it to me at the Shoreham Hotel in positive terms, and said that while our people did not consider that they were bound to do so, pending the adjustment of the controversy between us regarding the right to proceed with construction under the Act of March 3rd, 1875, nevertheless, they were clearing the right of way. I shall hear from Mr. Field shortly, and will advise you immediately.

The Forest Service and the Railway Company both have to deal with a large number of employes and subordinates, and it is not strange that conflicting reports come from the two classes of people. However, I have great confidence that the Forest Service desires to deal fairly with us and I hope we have convinced you that our purpose is equally meritorious.

I asked Mr. Field to expedite the matter in the West as rapidly as possible, and let me know what action his Company will take."

That July 10th, 1908, William L. Hall, Acting Forester in the United States Department of Agriculture, transmitted to Mr. H. H. Field, General Counsel of the defendant corporation, the following letter, to wit (formal parts and signature omitted):

[Letter, Dated July 10, 1908, Hall to Field.]

"Your letter of July 1 to the Acting Law Officer is received. I wish to thank you for your courtesy in sending me a duplicate of the map filed by your company on October 3, 1906. Mr. A. C. Shaw of this

office is now enroute for Seattle and will probably present for your consideration a rough draft of a bill for injunction [172] which has been prepared here. A large number of additions will have to be made to the descriptions of the lands mentioned in the bill. As soon as Mr. Shaw reports to the Forester any suggestions or desired changes, which you may care to present, the case will be submitted at once to the Department of Justice.

The officers in charge of the Pend d'Oreille (formerly Coeur d'Alene) National Forest state that it is almost impossible to find any official of the railroad who will assume any authority over the subcontractors of the company in reference to the general cutting of timber, both on and off the right of way, and state that it seems to be the attitude of the subcontractors that the railroad will ultimately be responsible and that no precaution need to be taken by them. The Forester is greatly disturbed about the apparent danger from fire owing to the lack of care used in the disposal of tops and brush, and about the apparently unnecessary destruction of timber outside the right of way through ill-advised cutting and logging. If you could inform me of some official of the railroad who would be authorized to consult with forest officers in relation to these matters, pending the final decision in the suit, it would undoubtedly result in great protection to the National Forest, and, if the contention of the Government is upheld, in a great decrease in the damages which would be collected from the railroad. Although I am well aware that the intention of the railroad is not to be bound by the require-

ments of the Forest Service, it seems to me that it would be to the interest of both litigants to take the action I have suggested and that the standing of the suit would be in no way affected. Without regard to the final outcome of the suit, the railroad is undoubtedly liable to the government for the timber destroyed and damage done through its negligence. Unless some action is taken by the company to remedy present conditions this damage will undoubtedly be very great, and I wish to urge upon you the necessity for immediate action.

My understanding has been that this litigation is not to affect any other relations between the Government and the company. I wish to call your attention, however, to the condition which exists in the Lolo National Forest. The railroad has neglected to sign a stipulation or to settle for timber already cut within that Forest. It is not my understanding that there is any doubt in that case as to the Government's right to make these requirements and I believe that the railroad will not be entitled to any consideration unless it settles this matter promptly. The same applies to the erection of construction camps outside of the Railroad's right of way.

I enclose a copy of a revised stipulation the original of which I have sent to Mr. G. R. Peck, General Counsel for the railroad. This stipulation differs from the one last submitted to you only in regard to the width of the right of way. I also enclose a copy of my letter of today to Mr. Peck."

That July 23d, 1908, Mr. Field transmitted to

Mr. Hall the following letter, to wit (formal parts and signature omitted):

[Letter, Dated July 23, 1908, Field to Hall.]

"Your letter of July 10th, was duly received. Mr. Shaw called and showed me a draft of the bill for an injunction, and I made some suggestions in regard to the frame work of the bill. As drawn, it appears to cover the timber cut outside the right of way and strip to be cleared, as to which the company does not deny its liability and in respect to which there has been controversy as to the price to be paid. We think that the prices charged are excessive. This timber was cut by contractors for [173] roads, camps, etc., and is in no way involved in the controversy with respect to the right of way. It seems to me, therefore, that all reference to it should be omitted from the bill.

Referring to that portion of your letter relating to the cutting of the timber in the Pend d'Oreille (formerly Coeur d'Alene) National Forest, I would say: Your letter is the first intimation that we have had that the cutting and clearing operations of the company in that reserve were not satisfactory to the Forestry officials. Our men engaged in the work have reported from time to time that they were working in harmony with, and according to the suggestions of, the local officials and others in charge of the Forest, and that the latter had expressed themselves as satisfied with our actions. We regret to hear that the contrary may be the case. Mr. W. E. Dauchy, Division Engineer of the Company, whose office is at

Missoula, Montana, is in charge of operations in that vicinity, and Mr. R. W. Day, Assistant Engineer whose office is at Taft, Montana, has direct supervision of the work, and if the Supervisors will confer with them they will find them both ready to work in harmony with the Forest Officials, and to do everything they can to prevent unnecessary trespass and to reduce the danger from fires. During the recent dry weather, we have put on a large number of watchmen to guard places that seemed to be the most exposed.

I enclose a copy of a letter from our Chief Engineer referring to the same subject."

That there was enclosed with said letter so transmitted to Mr. Hall a copy of a letter dated July 11th, 1908, received by Mr. Field from E. J. Pearson, Chief Engineer of the said defendant company, which said letter was as follows, to wit (formal parts and signature omitted):

[Copy of Letter, Dated July 11, 1908, Pearson to Field.]

"In regard to our conversation about clearing, etc., in the Bitter Root Forest Reserve, on last trip of Mr. Williams and myself, notice was taken and inquiry made with respect to the failure to burn the rubbish and slashings. In general we found such as had not been burned, gathered and piled ready for burning when weather became suitable. In a general way, it looked as if matter was being handled satisfactorily and local engineers stated they were doing work according to the requirements of the Forest Reserve representatives, and to the best of their knowledge and belief, entirely to their satisfaction."

That August 6th, 1908, Mr. Overton W. Price Associate Forester in the United States Department of Agirculture, transmitted to Mr. H. H. Field, General Counsel of the defendant company, the following letter, to wit (formal parts and signature omitted):

[Letter, Dated August 6, 1908, Price to Field.]

"Your letter of July 23 to the Acting Forester is received. If the Railroad Company decides to make payment for the timber cut outside the right of way and to give full and explicit directions to all contractors and sub-contractors that no further cutting is to be done outside the right of way and additional strips until permission has been secured and areas marked by Forest officers, I should be glad to omit all reference to such [174] cutting from the bill. Otherwise a suit upon this point is necessary. If the Company will not make payment and issue these instructions the whole matter should, I believe, be settled in court by one suit. If there is any legal distinction between the cutting on the proposed right of way and the cutting upon the lands outside, this would certainly appear in the Court's decree.

I wish to thank you for your suggestion that the Supervisor confer with Mr. R. W. Day, Assistant Engineer, who has, I understand from your letter, authority to make necessary arrangements to protect the Forest. I am informed by Supervisor Rutledge that he has already conferred with Mr. Day and that the present arrangements are apparently sufficient to protect the Forest. If Mr. Day has proper authority

to insist upon their being carried out. In this connection I urgently recommend for mutual protection that contractors and subcontractors be instructed to burn and dispose of brush and debris under the direction of Forest Officers, and that streams which have been obstructed by timber and debris in connection with construction work be cleared so that the bridges may be protected.

I am sending you under separate cover a draft of the bill for injunction which will soon be submitted to the Attorney General, and I should be glad to receive any suggestions you may care to make before the United States Attorney takes action. The Bill will be further changed, of course, to request damages on the basis of wilful trespass for the cutting done outside the right of way and additional strips, unless an agreement is reached so that reference to such cutting can be omitted."

That August 13th, 1908, Mr. Field transmitted to Mr. Price the following letter, to wit (formal parts and signature omitted):

[Letter, Dated August 13, 1908, Field to Price.]

"I have your letter of August 6th referring to timber settlement (Interior March 17, '07 Coeur d'Alene National Forest) and to the proposed suit to be brought by the Government. On August 1st, 1906, we remitted to the Fiscal Agent of the Forest Service a draft for $1185.10, in payment of twleve timber trespass propositions in the Coeur d'Alene Forest. I believe that this payment disposes of all trespasses in that Forest outside of the right of way

and extra width to be cleared, at least we have paid all claims that have been brought to our notice. So far as issuing instructions to our contractors and others is concerned, we have done so from the beginning. Under date of July 10th, Mr. Hall, Acting Forester, wrote me stating that there had been complaint as to the clearing and the manner of disposing of the rubbish, etc. in the Coeur d'Alene Forest. Upon July 23rd, I wrote him to the effect that we had at all times given instructions as to the proper method of doing this work, and believed that they had been complied with. Upon further investigation we are satisfied that the reports said to have been made to the Forestry Service from time to time, as to the lack of precaution in these matters, were not well founded, or were made without sufficient information. We had intended at all times to comply with Forest Reserve requirements, aside from any controversy as to the execution of the proposed stipulation. I enclose a copy of the letter from the Acting Forest Supervisor at Wallace, Idaho, which confirms the statement made in my letter to Mr. Hall in respect to our position in these matters.

When the bill for injunction is received, I will examine it and shall be glad to make any suggestions that may occur to me, and as above stated, if it is a fact that all timber trespasses outside of the right of way have been settled for, they should, of course, be omitted from the bill. Mr. Peck will be here during the week of August 24th to attend a session of the American Bar, [175] Association and I desire to confer with him in regard to the bill; hence I trust

it will be satisfactory if I do not send any suggestions, that we have to make, until after I shall have conferred with him."

Testimony of Witnesses.

EXAMINATION ORALLY BEFORE J. B. HOGAN, SPECIAL EXAMINER.

Plaintiff offered in evidence a letter from W. M. Hays, Acting Secretary of Agriculture, dated March 14, 1905, to the Honorable Secretary of the Interior, marked Exhibit 1 for identification, with the endorsement thereon, said exhibit, excepting the certificate, formal parts and signatures, reads as follows:

[Plaintiff's Exhibit 1—Letter, Dated March 14, 1905, Hays to Secretary of Interior.]

"As a result of investigation by the Bureau of Forestry in the State of Idaho, I have the honor to recommend the immediate withdrawal of the following described lands, pending the creation of the proposed Shoshone Forest Reserve:

Township 47 North, Ranges 3 to 6 east; Township 46 North, Ranges 3 to 7 east; Township 45 North, Ranges 5 to 9 east; Township 44 North, Ranges 4 to 9 east; Township 42 North, Ranges 3 to 9 east; Township 42 North, Ranges 3 to 11 east; Township 41 North, Ranges 4 to 11 east; Township 40 North, Ranges 7 to 11 east; Township 39 North, Ranges 7 to 14 east; Township 38 North, Ranges 8 to 9 east; Township 37 North, Ranges 7 to 9 east; Boise Principal Meridian."

The endorsement on the foregoing letter in words and figures reads as follows:

(Testimony of Door Skeels.)

"1006.

Department of the Interior: Received Mar. 18,1905.
L. & R. R. Div.

Acting Secretary of Agr. March 14, 1905.

Recommends the withdrawal of described lands for the proposed Shoshone Forest Reserve, Idaho.

J. I. P.

DEPARTMENT OF THE INTERIOR,
March 20, 1905.

U. S. General Land Office,
Received Mar. 21, 1905. 4770.

48961

Acknowledged and respectfully referred to the Commissioner of the General Land Office with instructions to withdraw the lands herein described in accordance with the recommendation of the [176] Acting Secretary of Agriculture, unless there is some good reason why such action should not be taken.

Advise the Department of action taken with return of this letter.

E. A. HITCHCOCK,
Secretary.

[Testimony of Door Skeels, for Complainant.]

DOOR SKEELS, a witness for the complainant, after being duly sworn, was examined by Mr. Lingenfelter, United States District Attorney for the District of Idaho, and testified as follows:

My name is Door Skeels. My place of residence is Libby, Montana. I am a Forest Supervisor; have been acting in that capacity for two years the 12th of next May. I entered the Bureau of Forestry as a

(Testimony of Door Skeels.)

forest student in the fall of 1903. I worked in the Bureau of Forestry until the fall of 1904. I was in college at Ann Arbor, Michigan. I have acted as State Forest Commissioner of Michigan. Have held the office of Forest Assistant and acted as Forest Supervisor of the Coeur d'Alene National Forest. In the fall of 1908 I went to Portland, Oregon, as an assistant in the branch of timber scales in the office of District 6. I served in that capacity until in May, 1909, when I was appointed Forest Supervisor of the Kootenai National Forest of Libby, Montana. I have charge of the Kootenai National Forest; look after its administration, protect the forest and I look after the use of the forest by the people of that region who have need to use the forest. I have had experience in timber cruising extending over the past 12 years. During the past 7 years I have had practice in that work nearly all the time. That is part of my duties yet. I helped my father cruise State College land for the State of Michigan and value them and appraise them and getting them ready to put on the market to be sold, and they were sold at the values we put on them. I worked twice for large lumber companies in the summer of 1903, just before I entered the Forest Service. I measured the trespass on ten sections of land on Shoboygan County, Michigan, and the next work I did when I entered the Bureau of Forestry in 1903 [177] was to help cruise the holdings of the Kirby Lumber Company and the Houston Oil Company in Texas.

I have used several systems of cruising timber

(Testimony of Door Skeels.)

depending largely on the region in which I am working, the character of the land and timber; my usual system is to pace out any corner from the section on the section line, 125 paces, and then run at right angles to that across the section to the other section line, then offset the same distance as before and come back parallel to that, thus going twice through each forty until I have covered the section in parallel lines. I cruise in about forty-acre subdivisions.

That system is in most general use by cruisers. I am able by that system to ascertain accurately the amount of timber on a forty-acre subdivision.

My estimates made as a cruiser have been acted upon by large timber interests; and in many cases since I have been acting for the Government, in practically all of the cruises after I had cruised the timber it has been cut and scaled by log scale so that in almost every case I have been able to know how close I have cruised them.

My cruises have been tested by actual cutting of the logs and converting it into lumber. **[178]**

It was in the spring of 1907 that the Milwaukee Railway started actual construction work upon its railroad through the Coeur d'Alene National Forest Reserve. At that time I was Forest Assistant on the Coeur d'Alene National Forest Reserve, acting as Assistant to the Supervisor, Mr. Rutledge.

I worked under Mr. Rutledge in charge of that part of the forest through which the Chicago, Milwaukee

(Testimony of Door Skeels.)

& St. Paul Railway Company of Idaho were building their railroad.

I was first called upon to go over the proposed right of way and make accurate estimates of the timber which would be taken off from the strip 200 ft. wide and 100 ft. on each side of the center line of the railroad through the forest. I was also requested to prepare a supplemental report recommending certain stipulations which the railroad company would be required to agree to in order to properly protect the forest in building and operating their railroad.

To protect the forest,—I refer to the damage which might be done through fires which would be spread from the railroad, both during the period of construction and the period of operation, the damage which might be done to roads and trails which were in the forest that might be destroyed in building the railroad, and the lawless element which might be brought into the forest during the period of construction, the payment for the timber which would be destroyed or used in building the railroad. The question of the company's agreeing to some co-operative patrol system to lessen the danger of fire and to find fires in time to put them out.

The representative of the company who acted in conjunction with me was Mr. Day, the Assistant Division Engineer.

Mr. Day assured me that it was the desire of the railroad company to comply with all the regulations and requests of the Forest Service, and of officers

(Testimony of Door Skeels.)

in charge of the Coeur d'Alene National Forest. That they wanted the timber on the right of way cruised **[179]** carefully so it would be known how much timber there was and how much it was worth. He wanted the work of constructing the railroad so conducted that it would comply with all things that we desired in order to properly protect the forest.

He was acting as Assistant Division Engineer. I was told that by other representatives of the company; I saw copies of letters which he had received from other officers of the company; I heard Mr. Peck, General Counsel for the company, in our office in Washington refer to Mr. Day as the Assistant Division Engineer who was the man in charge of the work on the ground through the Coeur d'Alene Forest.

Many times in conversation with the officers of the Forest Service at Washington Mr. Peck said that Mr. Day was the company's agent on the ground and was the man that the local office at Wallace should deal with.

Mr. Day did act as Assistant Engineer during the entire time the road was being constructed through the Forest Reserve.

Mr. Day introduced me to a man who he said was the timber cruiser, namely Baker, I don't remember his first name, whom he said was a very good cruiser, and he said that Mr. Baker would go over the right of way with me and criuse it at the same time that I did, in order, I understood, that the company might be satisfied and know that the estimate

was being properly made. Mr. Baker accompanied me on a part of the cruising on a few different days, but he was not very robust; he used to get quite tired and quite often he did not go with me so that when he finished the cruise he hadn't gotten all of the figures for the entire right of way and he was satisfied with my cruise and the way I handled it, and he said he was, and he asked me for a copy of my figures; he said he would just as soon have them as if he had made them himself. I cruised the right of way.

In this cruise which I first made of the timber on the right of way 200 ft. in width, most of the timber was either standing on the [180] ground or had just been felled and laid on the ground at the time of making the cruise, and where the timber lay on the ground in nearly every case I scaled it. I scaled it with a scale rule which I carried with me all the cruise. When the timber was standing on the right of way, I tallied every tree, and got every tree on the right of way, which was 100 ft. on each side of the center of the railroad.

I made a report of my work. I haven't that report; I have the report here of the cruise which I made of the right of way, which they finally cleared. They finally cleared the right of way over 200 ft. in width. The company in cutting their right of way through there cut it wider width. In some places it was over 200 ft. wide on each side of the center line and it would vary to 250 ft. in some places. In some places they only cleared out 50 ft. on one side

of the center line. As the work went on, I had to cruise the right of way as they cleared it over again to get what they cut.

It was done because in the construction of the railroad by the same company in Montana through the Helena National Forest, the Forest Service required them to clear a strip 200 ft. in width on the upper side of the center line, depending somewhat on the topography; it being agreed by the company that if they were allowed to proceed with the construction of the railroad through the Coeur d'Alene National Forest, that they would do the work in the same way.

Mr. Day stated to me repeatedly that the company and its men desired to comply with the usual regulations required by the Forest Service when railroads were built through the National Forest, and he told me that he had been instructed by the company that that was their desire. He used to speak of that very often; almost every time that I saw him, he tried to impress upon me the fact that he was very anxious to comply with our requirements. I don't think that Mr. Day ever mentioned the Peck agreement in so many words. I doubt if Mr. Day personally had ever been informed [181] just how his company had bound themselves.

I have those estimates that I made of the timber that was cut over the right of way as finally agreed upon, which as I said is irregular in width. That estimate shows the amount of timber cut in each forty-acre subdivision and the number of acres which

(Testimony of Door Skeels.)

they cut over in each forty acres. That begins at the Montana line, in Sec. 26, Tp. 47 N., R. 6 E., B. M.

At the close of each day I worked up my notes and entered the data on the map. The report wasn't submitted to my superior in the Forest Service until I had finished work.

This report now before me was in nearly every case made at the close of the day when the estimate was made; sometimes I might go two or three days before I worked up the data on these maps in my report, but it would depend a good deal on the way the work went.

I began with 26, Tp. 47 N., R. 6 East. I think I began that work in about June, 1908; it wasn't finished until along in the fall, probably near the close of September, 1908.

In many of these sheets the report or memorandum before me was made the same day as the estimates were made; in other cases it might be a day or two days later. I have before me a correct memorandum of the estimates made by me. It took me all summer to make the estimates and these reports were made right along with the estimates at the time. I can remember pretty much the way the stand run through each forty acres—without referring to this memorandum—in a general way. I couldn't give it right down to an absolute number of feet, but I was on that work so long and was in it so thoroughly that I remember in a general way just how good the stand was on every part of it.

(Testimony of Door Skeels.)

NOTE.—Mr. Dudley, appearing as counsel for the defendant, several times interposed objections to the proposed use of the memorandum, reports and notations referred to by the witness either as substantial evidence or to refresh the memory of the [182] witness on the ground that documents which the witness was asked to read into the record he states were not his original memorandum, but compilations prepared by him from his original memorandum, and therefore not admissible as books of original entry, and if not admissible evidence, they cannot be gotten into the record by having the witness read them into the record under the form of refreshing his memory, and on the further ground that under the circumstances if the witness has individual knowledge, he is not entitled to refresh his memory from his memorandum or in any manner. The intention being by the proposed mode of proof to get before the Court the documents themselves rather than the witnesses testimony.

Q. You may refresh your memory from the memoranda prepared and state the amount on each subdivision prepared by you and you may also state any independent knowledge that you have that you care to state.

A. From the Southeast quarter of the Southeast Quarter of Sec. 26, Tp. 47 North, Range 6 East; 200 ft. board measure, white pine; 800 ft. board measure lodge pole pine; 9400 ft. board measure of spruce; 3500 ft. board measure of white fir; a total of 13900 ft. board measure. On the SW.¼ of the SE.¼ of

(Testimony of Door Skeels.)

Sec. 26, Tp. 47 N., R. 3 East; 400 ft. board measure white pine, 1600 ft. board measure lodge pole, 18,800 ft. board measure spruce, 7,000 ft. white fir; total, 27,800 ft. board measure.

I made a written report.

NOTE.—Exhibits 2 to 33, inclusive, being the memoranda prepared by the witness as the estimates of the timber in question, are read into the record and received in evidence, subject to the same objections heretofore offered by the defendant in this case.

(Witness gets written report.)

Q. You may state what paper that is you hold in your hand.

A. That is a report which I made to the Forester of the Forest Service, stating the amount of timber which was cut by the railroad company on their right of way and on the strip along their right of way in building their road through the Coeur d'Alene National **[183]** Forest. It is a compilation of Exhibits 2 to 33, inclusive. It was made in the course of my official business.

NOTE.—A copy of estimates, being marked Exhibits 2 to 33, inclusive, and of report being marked Exhibit 34 offered in evidence.

Mr. Dudley objected to the report on the ground of its incompetency.

For experience in the sales of timber I have sold a good many tracts of timber for the Forest Service through Montana and Idaho in the last four or five years. I have sold several different tracts in this immediate locality where the timber was of like

character as that cut by the railroad company on its right of way. What I sold was in all sized lots from 4000 to 5000 ft. up to 7,000,000. None of it was any more accessible than this; some of it was quite a little harder to log than this. I can state that from my knowledge of timber and sales made in that locality, I am acquainted with the market value of that timber. I have made between fifteen and twenty different sales. I was acquainted with the market value of timber of like character situated as this timber was.

NOTE.—Mr. Dudley, for the defendant, objected to testimony of the witness as to the value on the ground that he was not shown to be sufficiently qualified upon that point.

The stumpage was worth four dollars a thousand feet board measure. In the fifteen or twenty sales that were made none were for less than $4 a thousand feet board measure; we got from $4.00 a thousand feet to $6 per thousand feet. That was the general value of that lot of stumpage.

If a man had a stand of white pine timber alone, it would have been worth a little more. White pine lumber brings a larger price and if it had all been a stand of white pine, it would have been worth $5 or $5.50 per thousand, and the average value also taken into consideration; costs of logging the timber in different places along the right of way would make the average value $4.00 **[184]** a thousand feet board measure for all kinds.

This timber was saw timber and tie timber.

(Testimony of Door Skeels.)

There was a little timber in it that was more suitable for mining timber than any other purpose. The larger part of it was saw timber. White pine predominated.

The Chicago, Milwaukee Company settled eight or nine trespass cases in that locality. I had charge of the settlements under the direction of Mr. Rutledge.

NOTE.—Mr. Dudley, in behalf of the defendant, objected to testimony as to the amount paid in settlement of trespass cases, for the reason that the price paid in the compromise of a trespass affords no indication as to the market value of the timber, and such testimony is irrelevant.

Q. What amount did the company pay for the timber in settlement?

A. It was from $4.00 to $6.00; the highest price paid was $6.00 in one case and the lowest price paid was $4.00. Our prices varied along from $4.50 to $5.00.

I was in charge of settlements made with other parties for timber cut within the forest reserve of similar character and locality as this.

NOTE.—Mr. Dudley, in behalf of the defendant, objected to testimony as to other settlements by trespassers on the ground that payments made in compromise would afford no basis upon which to determine the value of timber.

They paid $4.00 to $5.00. I think in some cases $5.50. The usual price was between $4.00 and $5.00. I made sales other than those in trespass cases.

(Testimony of Door Skeels.)

NOTE.—Mr. Dudley objected to testimony as to other sales on the ground that it does not appear but what there were exceptional circumstances which would control the sale price and it is improper testimony upon which to base the value.

The prices were paid at $4.00 and $4.50. I am basing the market value of this timber on the quality of the timber and the cost of logging it and the general market values at that time of [185] lumber. I know what the manufactured product of that timber would be worth, my knowledge of what lumber was selling for at that time. The manufactured value was the market value of lumber at that time. The forest service once a month got out a report showing the market value of lumber in the various lumber markets in the country.

I know the cost for cutting a tree down. It would be eighty cents for cutting a tree down—for falling a tree and cutting it into logs. The next step would be the skidding of the log. That cost would average there about $1.50 per thousand for skidding it to the river. The next would be banking. The banking wouldn't cost more than two bits there. The next cost would be driving down to where the Improvement Company would take it. The drive would cost $1.00. Then the Improvement Company's charge for taking the drive down the rest of the way and storing it would be seventy-five cents. The cost for booming and towing to the mills on the Coeur d'Alene Lake would be about 65 cents. There would be a further cost of about $1.00 for the wear and tear on

(Testimony of Door Skeels.)

tools, interest on investment and general administration costs of conducting logging operations. That puts the logs to the mill.

The total cost of logging would be about $6.00. The cost of manufacturing the lumber would vary from $3.00 for rough saw timbers to $8.00 for such finished lumber as dressed and matched flooring, some grades of which would cost the most to manufacture. The cost of manufacturing the mill run would be about $5.00 a thousand.

There would be one more item of cost to go in there. It would be the administration at the mill, the interest on the investment, what the mill-man calls the "overhead" charges, which would be about $1.00; that would make the total cost of manufacturing at that time $12.00 a thousand.

No. 1 common boards, white pine, at that time, would sell **[186]** f. o. b. for about $20.50 and in some cases $23.00. The f. o. b. market value of lumber, as it would vary a little bit because when they shipped to certain markets, they have to sell it a little cheaper than in other markets. I think about $22.00 would probably be the market value of No. 1 common boards, f. o. b. the mill, for the average at that time. No. 2 common boards would be sold at that time for from $17.00 to $19.00 a thousand.

If the timber as cut by the railroad company had been converted into lumber as I here classify it—the mill run would have been equal in value to the value of No. 2 common lumber. The values that I have just given were for No. 1 common. The aver-

age value of the lumber that would have been made from this timber would have been No. 2 lumber. The market value of No. 2 at that time would have been $17.00 to $18.00 a thousand.

I was at, and previous to the time of construction of this road, familiar with the North Fork of the St. Joe River and its tributaries.

NOTE.—Mr. Dudley in behalf of the defendant objected to evidence as to the condition of the river and the tributaries with respect to being navigable for logs as irrelevant and immaterial from the issues in this case and incompetent to prove any of the issues in the case.

The North Fork was, from where it entered the St. Joe River up to where the East Fork and the Little North Fork joined to make the North Fork navigable for logs and small boats. I traversed this stream many times prior to the time the railroad was constructed through the Forest Reserve. I saw this stream at the time they completed the construction. I made an examination to ascertain the different points of obstruction on this river.

I have a memorandum stating where part of these obstructions were made in the stream and what they consist of. The memorandum was made at the time the obstructions were being put into the river. When I started it I was in charge of the forest and before it was finished, Mr. Weigle took charge of the forest and it [187] was finished under his direction.

Q. You may use that memorandum for refreshing

(Testimony of Door Skeels.)

your memory and state at what points and how the points are designated on the map, did they obstruct this stream, and what the obstructions consist of?

A. Coming down the river from the junction of the Little North Fork and the East Fork, the first obstruction of which I prepared a memorandum was in the river at a point a little above the east portal of Tunnel No. 30 in the SE. ¼ of Sec. 7 Tp. 46 North, Range 6 East. The rock at that point was thrown into the creek, filling the channel completely from bank to bank at the normal stage of water and backing the water for a distance of about 200 feet. The next obstruction coming down the river was at the east portal of Tunnel No. 31 on the line between Sections 7 and 18, partly in each section, Tp. 46 N., R. 6 East. The boulders and broken rock were thrown from the right of way into the channel so as to completely fill it and back the water into the stream for a considerable distance, making log driving impossible. The next obstruction of which I have any memorandum was at the west portal of No. 31 in the NE. ¼ of the NW. ¼ of Sec. 18, T. 46 N., R. 6 E. Boulders and broken rock were thrown from the fill at the portal of the tunnel into the channel of the stream so as to completely fill it and back the water into the stream for a distance of several hundred feet, making log driving impossible. The next obstruction was from 100 ft. to 200 ft. below the west portal of Tunnel No. 32 in the SW. ¼ of Sec. 18, Tp. 46 N., R 6 E. The rock fills the channel of the creek for 200 ft. along its course and have already formed

(Testimony of Door Skeels.)
a big jam of driftwood above it, the rock in the stream rendering log driving impossible. The next point was at the west portal of No. 33 in Sec. 24, Tp. 46 N., R. 5 E. The rock was thrown down along the base of a large fill, filling the creek channel completely with broken rock for a length along the creek of 250 ft., blocking up the water for 700 ft. above the obstruction, rendering log driving impossible. All [188] of the distance for which the water is backed and the reference to filling the stream is at the normal stage of water. The next obstruction is about three-eights of a mile and below the west portal of Tunnel No. 33 in SE. ¼ of Sec. 24, Tp. 46 N., R. 5 East. Several large masses or rock ten to twenty feet in diameter have been thrown down into the creek and filled its bed for a width of fifty feet rendering the stream unfit for log-driving. The next obstruction is a short distance above the east portal of Tunnel 34, SW. ¼ of Sec. 25, Tp. 46 N., R. 5 E; several large boulders from 8 to 16 ft. in diameter have been thrown from the right of way into the creek forming a complete obstruction to log-driving. The next obstruction was about a mile above Avery where the creek channel has been completely filled by a fill made to form a right of way and the channel of the creek destroyed and thrown out into the surrounding country to make its own channel.

The railroad ran along the course of the river and they built in the fill out to fill the river, throwing the stream out over the lower bank to cut it away around the fill.

(Testimony of Door Skeels.)

I know of my own knowledge that those obstructions were made by the Chicago, Milwaukee & St. Paul Railroad Company of Idaho.

The Government has more than two hundred million feet of merchantable timber on the waters of this stream above the rock obstructions to which I have testified.

NOTE.—Mr. Dudley, in behalf of the defendant, objected to testimony referring to means of transportation which the Government has for this timber because not material or competent.

For more than held of this timber the sole means of transportation is by the North Fork of the St. Joe river. For the remaining part of the timber which I mention, the best and cheapest method of transportation is by the North Fork of the St. Joe River, although it might at great cost be gotten up to the right of way and loaded on the railroad and transported in that manner.

It would be necessary to grade roads on the right of way at [189] various points to clear and level ground out of the side of steep mountains for landing cars. It would probably be necessary in taking out most of that timber by rail to have quite a little steam power equipment for handling the logs. The railroad is up on the side of the mountain so that all of the timber which stands on the west side of the North Fork of the St. Joe River and on streams draining into the North Fork of the St. Joe River on the west would have to be taken across the river and pulled up the mountain side to the railroad.

(Testimony of Door Skeels.)

Q. Mr. Skeels, in the construction of this right of way, what did the company do, if anything, with reference to the piling of the brush?

A. During the summer of 1907, when the brush could have been burned without danger to the forest, they delayed in burning the brush and failed to dispose of it.

Mr. DUDLEY.—I move to strike that as not in response to the question.

But in the summer of 1908, about the middle of June, they started to burn the brush which they had made and were making in clearing the right of way.

I know of my own knowledge of fires having been started on the right of way in the summer of 1908.

One started at Burns & Jordan's camp, a small fire; one started in what they call "the loop" at a point where the railroad crosses Kelly Creek; one started at a point a short distance above Sturtevant & Proctor's camp in the NE. ¼ of Sec. 7, Tp. 46 N., R. 6 East, and several other fires started along there for which I cannot give a definite location at present.

NOTE.—Mr. Dudley objected to the introduction of any testimony relative to fires for the reason that whatever damages resulted from fires would have to be recovered in an action at law; the court in equity has no jurisdiction to pass upon this matter [190] and it is incompetent under the issues of this case. I wish to have my objection understood as going to all of the testimony in regard to the fires.

I am familiar with the burned territory or area that was burned over.

(Testimony of Door Skeels.)

The fire that started near the Burns & Jordan camp burned over about thirty acres; the worst fire started in the clearing made at Kelly Creek bridge and burned north and east to the summit of the Bitter Root Mountains; it covered the greater part of four sections.

I am familiar with the character of the timber at the time it was burned. Over so large an amount of land as that; there were severel qualities of timber; there was mature saw timber, especially in the gulches of the streams and towards the summit of the Bitter Root Mountains; the principal species was white pine, with quite a mixture of Douglas fir, white fir, tamarack and cedar. There was also a large amount of young growth from seedlings 4 or 5 feet in height to timber of pole size; timber 60, 70 and 80 years old, from 6 to 12 inches in diameter at the stump, and 40 to 80 feet in height. The young timber was of the same kind as the mature saw timber.

The fire killed the timber and young growth.

I did not make an estimate of the timber that was burned; I had Mr. Seery make an estimate under my direction.

I am acquainted with the reasonable market value of the timber that was destroyed by the fire.

I base my valuation upon the price which we were being paid for timber of similar quality and accessibility and the knowledge of the quality of the timber, the cost of logging, milling and the value of manufactured lumber.

The reasonable market value of that timber at the

(Testimony of Door Skeels.)

time of the fire was $4.00 a thousand feet board measure. That would be the general average.

Cross-examination by Mr. DUDLEY. [191]

Q. You didn't cruise this timber that was burned yourself?

A. I was with the cruiser part of the time, but I didn't attempt to make any estimate of the quantity. I did not go over all of the subdivisions that were burned.

It is not true that my estimate was made without reference to the value of any particular timber and only a general valuation of all timber up in that vicinity. I did see it. I did't go over all of the subdivisions. The right of way had been bruned off so that by going through each portion two or three times a person could see the whole thing.

I know that it was all about the same general character and it is on that basis that I get my values.

All of this timber that was cut and burned was west of the summit of the Bitter Roots, and the general market for the timber in that section of the country is down here in the Coeur d'Alene region. There were sawmills in the St. Joe valley, above St. Joe, at the head of navigation. There was a sawmill on Clear Creek cutting about 50,000 ft. a day. A man named Douglas was running that mill. He was not cutting for the railroad company. He was cutting for Flewelling, I believe. I am not sure of the title of the company. It was the Monarch or the Milwaukee Land Company. Clear Creek has its mouth in Sec. 11 T. 46 N., R. 6 E., and it drains all

(Testimony of Door Skeels.)

of Section 14 and parts of every other section lying south of that. That mill was running in both 1907 and 8. It wasn't being operated solely for the purpose of furnishing material for the construction of the railroad. They did ship lumber out of there and they hauled lumber out of there during 1907 and 8 and later after the road was completed.

They hauled lumber to different saloon buildings and business buildings that were being built in that country. It was used for building those buildings.

They did not take any lumber east of the mountains that I know of. It is my understanding that they shipped lumber over [192] the railroad further down than Avery, but I couldn't say from knowledge. The railroad was not in operation until the spring of 1909.

They had a small amount of lumber piled in the yard there which they didn't use and didn't propose to use in building the railroad. That lumber was there for sale. I had a letter from an agent of the company who offered me a commission if I would sell that lumber for them. They were quite anxious to dispose of it if they could.

I don't remember whether the town of Ferrell is above or below St. Joe.

White pine logs in Lake Coeur d'Alene in 1907 were worth about $10.00 a thousand. I couldn't tell you just what yellow pine logs were worth in the lake at that time. We were not selling any yellow pine. Red fir logs mixed with white pine brought practically the same as white pine. Red fir logs were

(Testimony of Door Skeels.)

worth not less than $8.00, but not bought alone in the lake at that time; I don't think there was any definite market, especially for red fir alone.

Spruce logs of the quality that was cut over the right of way was worth the same as white pine. There was other timber there than white pine or spruce—lodge pole pine and white fir. Lodge pole pine was not sold by the thousand, it was sold for mining timbers and for ties, but at the rate at which it was sold it brought a stumpage of $4.00 or $5.00 a thousand.

In 1907 I do not know of any sales of tie timber being made by other people. I would not say that there was no sale as high as $5.00 a thousand—not as stumpage.

The defendant in this action was not the only consumer of tie timber through that country. I do not know of any tie timber or ties manufactured above the head of the navigation on the St. Joe River sold to any other than the Chicago, Milwaukee & St. [193] Paul or the Chicago, Milwaukee & Puget Sound. At that time this railroad was paying a higher price than the O. R. & N. Railroad was.

White fir logs in the lake in 1907 were worth about $5.00 a thousand if they were mixed with other timber. They wouldn't buy them alone so far as I know. In 1908 the lumber market fell very materially. That slump was in the winter of 1907. The spring of 1908 opened with a very poor lumber market and continued to a great extent to the present time. It is not true that in 1908 stumpage was worth less than

(Testimony of Door Skeels.)

1907; the stumpage prices, notwithstanding the lower value for lumber, increased slightly since that time.

Avery is at the junction of the North Fork of the St. Joe River and the main St. Joe. After you get above there, along the North Fork, that is a mountainous country, not very rough. I think the highest point along the summit of the Bitter Root Mountains, at the head of the St. Joe, is about 5,000 or 6,000 ft. elevation. Around Avery the height of the mountains is 5,600 ft. I would not think they were very steep.

Logging has been done above Avery. On Clear Creek a large sale which we made there to the outside managed by Mr. Douglas, a number of sales to contractors on the railroad, a sale of stumpage cut along the right of way, which was scaled on the river bank and driven down the river and sawed as lumber at Avery, both above and below it; they drove the logs down the river from Avery and sawed them. That was the stumpage that was cut in clearing off the right of way, but it was handled as saw timber. Outside of this mill at Clear Creek, the stumpage sold to contractors was for construction purposes of the railroad. There was a very few small sales made to people that was building up through that country, business places, saloons and the like.

Prior to 1907 the Government owned all the stumpage; there couldn't have been any logs driven down the North Fork. During [194] the construction of the road in 1907, there was driven down the North Fork only such timber as fell down off the right of

(Testimony of Door Skeels.)
way and was driven down the streams during high water. There was quite a good deal of timber carried down that way.

Q. That wasn't driven; it was washed down by nature?

A. The stream carried it down during the natural flow of the stream.

Q. What experience have you had in logging?

A. I was born and brought up in a logging country, that was my first business, and I have been around logging operations all my life.

Q. That is a level country?

A. It is very much more level than this country is.

Q. You have never logged in the mountains?

A. I have exercised supervision over mountainous country.

Q. Where, Mr. Skeels?

A. Montana, Idaho and Oregon.

Q. The only way the timber could be gotten into the North Fork of the St. Joe, would be by constructing log chutes?

A. No, since the railroad has been built, that is the one way that couldn't be used along there.

The North Fork is from 40 feet to 80 feet in width. The point I am speaking of now is from the confluence of the Little North Fork and the East Fork down to its mouth near Avery. And its depth—at the very lowest stage of water in the river before the rock was put in the stream, it wouldn't have been possible to have crossed the stream any place without getting wet up between your knees and hips. It

(Testimony of Door Skeels.)

is a typical mountain stream; has a good strong current. There is a general fall right straight through on the river. The river has a swift current; there are no rapids.

There was lots of logs went down that stream during the course of building the railroad in time of high water. At the [195] stage of low water you couldn't have driven without splash dams. The high water lasts about three months.

From the junction with the main stream at Avery it is quite a large stream on down to the head of navigation at St. Joe. It is a large river from that point. From there down there are quite a few small rapids. I don't think there is a single case where the rapids reach clear across the stream or even more than half way across. It is a very good stream for driving. [196]

I have seen small boats navigating the North Fork. I saw river boats taken up there by the prospectors in the summer of 1907 before the trail was cut. Not dugouts nor canvas boats—river boats built of lumber, somewhat similar to the boats they use on the drives, both pointed ends, made to pole.

I say that I know of my own knowledge that the rock obstructions I found in the stream came from the railroad. I did personally see rocks thrown in at each of these obstructions—many times at each obstruction—during the construction; while they were blasting there.

The cost of removing those obstructions would be comparatively easy estimated.

(Testimony of Door Skeels.)

The first one of the fires I mentioned was at Burns & Jordan's camp in Sec. 27, Tp. 46 N., R. 6 E. The camp stood on the right of way and on the 100 foot strip. That fire was started in 1908. The contractor's camp was there at that time. It started from the burning of brush on the right of way.

We were given to understand by the railroad company that the contractors were working for the railroad people, under contract. I know it was started by the contractors. I think I spoke next of the one in clearing off the bridge at Kelly Creek. The contractors were working there. That was started in the course of their operations.

There were two or three fires along in there before you got to Sturtevant & Proctor's camp; I think that was the next one that I spoke of, in Sec. 7, Tp. 46 N., R. 6 E. That was just above the mouth of the North Fork and the Little North Fork, which they took to reach that section. This fire burned through parts of Sections 7, 8 and 5; the camp was in Sec. 5. That was also started by the contractors burning brush on the right of way.

I don't think I mentioned the definite location of any other fires in my testimony. There were two or three other fires down below there. [197]

Q. You were not personally present when any of these fires were started?

A. I was personally present when the fire started from the Sturtevant & Proctor clearing.

Q. But not the others?

A. I do not think I was right on the spot when the

(Testimony of Door Skeels.)

fire started at the moment.

I have personal knowledge of the other fire. It is very easy to see at the time those fires burned, where they started. A fire cannot start from any place and cover up its tracks as it goes.

Q. But the cause of the starting of the fires, would you know that personally?

A. I know the company's contractors were burning brush along the right of way and the fire started there. As far as I know, they were started from contractors burning brush along the right of way.

The place of the conversations in which Mr. Peck mentioned that Mr. Day was the local agent on the ground, was the Atlantic Building in Washington, D. C. I was present and heard the statements.

In these estimates, Exhibits 2 to 33, they include the timber cut not only on the 200 ft. right of way, but also the extra width. These extra widths were cleared at the request of the officers of the railroad company.

Q. The railroad company did not clear more than 200 ft. of its own volition without request of the forestry department, did they, Mr. Skeels?

A. I do not know.

I know that the forestry department regulations required the railroad to clear in many places in excess of 200 ft. And the company and the contractors on the ground understood that our regulations required that. I do not know if these extra cuttings were done to conform to these regulations or not. I do not know from direct knowledge whether these

extra widths were cut at the [198] request of the forestry department or not. I was partially or wholly in charge of this forest reserve at that time. I knew that they were cutting these extra widths.

Q. You didn't interpose any objection to the cutting of the extra widths?

A. I repeatedly informed Mr. Day that their whole work in that forest was in trespass during the summer of 1908, after they had repudiated the Peck agreement. I informed Mr. Day many times that their whole operation there was in trespass until they had entered into the agreement with the forest reserve, which we requested them to sign. I never objected to their cutting in excess of the 200 ft. because of the fact that it was off the right of way.

Q. And under your regulations you would have required them to cut these extra widths?

A. Yes. Not in every case just the same as they did cut. They suited their own convenience to a wide extent in cutting their wide width around wooden trestles and if they had entered into the agreement with the forest service, we would have required them to have cut a width of 200 ft. on the upper side of the center line and a width of 100 feet and in some cases of 200 ft. on the lower side of the center line.

Q. Then this extra cutting was done in attempted conformance with these regulations?

A. I don't know as to the 1908 cutting. The cutting in 1907 was done in an attempt to conform with our regulations.

(Testimony of Door Skeels.)

In my evidence I haven't distinguished between the 1907 and 1908 cuttings. The estimate made in 1908 includes timber cut in both years. Not in any case was there any timber cut there by trespass other than by the railroad company. I attribute that to the railroad company; all cutting that was done by the contractors and which was included in this report. The contractors [199] did other cutting in trespass which was not included in this report.

I testified that there has been a settlement by the railroad company for a number of trespasses. Those are not included in these statements. In 1907 I was up in the Coeur d'Alene Forest Reserve.

To become familiar with the market value of logs in Lake Coeur d'Alene during that year, I visited all the mills in this city and the mill down the river and little ones. Went through the mills and the yards and made studies at all those mills. Went into the offices of several of the mills and saw their records and talked with the managers of the companies. It was part of my business to have knowledge of those things and ascertain what they were paying for the logs in the lake.

My information is based upon what I saw, from the records and what they told me and knowledge from the logging operations in that district at that time.

And also from the reports which the forest service published each month at that time, showing the correct value of the lumber and all grades in the markets. In these estimates I have been only partly controlled

by the knowledge given me in the department reports at that time.

Q. You have no knowledge of the accuracy of the information given in these reports?

A. I helped make them. I know part of them are all right.

My estimate of the value of manufactured lumber was figured on the basis of the value of the manufactured lumber, the value of logs in the lake—I considered both values and other values.

All of these logs covered by my valuation were on the mountain slope and a short distance above the waters of the St. Joe and the North Fork and running down to those streams. None of them were back of the ridges.

The fire in burning through there was entirely in the watershed of the North Fork of the St. Joe River—the timber included [200] was all accessible for hauling to the North Fork. In some cases you would have to take it into some of the smaller streams that run into the North Fork; the East Fork of the North Fork could be driven by splash dams.

The Little North Fork of the North Fork, which contains probably the largest body of merchantable timber, could be driven—small drives in its natural state. The same is true of that as any other stream that has never been driven—many more logs can be driven by making improvements in it.

The lower part of Turkey Creek, the lower part of Clear Creek, the lower part of Kelly Creek, the lower part of Cliff Creek, the lower part of Rich-

mond Creek, and some other streams that I cannot remember the names of now, can all be driven by improvements with splash dams.

They are not navigable in their natural condition.

Some of the timber concerning which I have testified as having been burned are tributary to those tributaries, but all of it is a short distance from the East Fork or the main fork of the St. Joe. None of it was so situated that in hauling to the main channel of the North Fork, it would have to be hauled over the divide; every bit of it was on the watershed of the St. Joe and near the tributary streams and it would naturally be hauled down stream all the way.

The value of the timber would not vary much with its location, depending upon the expense of cutting it; it would not vary much.

The valuation I have given has taken into account the difference arising from the difference in location. I have given the general value for all of the timber. The same general value that it would be worth with timber men who was going to log that amount of timber as a logging job, taking the good and the bad altogether. There was no timber sold by private individuals to logging concerns on the St. Joe River in 1907. [201]

I don't know that the Monarch Timber Company bought over a quarter of a million dollars worth of timber on the St. Joe River in 1906 and 1907 and located all of it above the head of navigation. It certainly was located some distance away from the timber in question, at least thirty or forty miles dis-

tant in a straight line. Timber located lower on the St. Joe—might be more cheaply gotten out than that on the upper St. Joe and it might cost a great deal more. The cost of driving is one of the lowest features of logging and the quality of the timber might be very much poorer. The body that was burned was the finest stand of white pine timber that I ever saw any place.

I don't think that the finest stand of white pine timber along the St. Joe River was up on Mica Creek.

Q. It is one of the tributaries below Avery?

A. I don't think that is the case.

I don't think the white pine timber along that section did sell in open market in 1906 at from $2.00 to $2.50 a thousand, stumpage.

If white pine timber was selling on the open market on the St. Joe at from $2.00 to $2.50 a thousand, my estimate of $4.00 a thousand stumpage is not excessive—that does not follow.

In making an estimate I might consider what timber was actually selling at on the open market nearer the head of navigation, if I had absolute knowledge of what timber was sold at on the open market in that region—and not in some private transaction—and if I had absolute knowledge of the quality of the timber and the costs of logging it.

Q. And you made no inquiries to find out, did you, what lumber companies were buying white pine stumpage for along the St. Joe River and its tributaries, between St. Joe and Avery, in 1906 and 1907, in figuring your estimated value?

(Testimony of Door Skeels.)

A. At all the times when I am working in the forest service I endeavor to find out as much as I can about what prices are [202] being paid for timber and to get knowledge of transactions of that kind, and so on.

I did not make any inquiry to find out what the Monarch Timber Company, or A. L. Flewelling, were paying for white pine stumpage tributary to the St. Joe River between Avery and the head of navigation at that time.

I made no inquiry to find out what the Rutledge Timber Company was paying for white pine timber between Avery and the head of navigation at that time, standing timber, stumpage; nor what the McGoldrick Lumber Company was paying for white pine timber between Avery and the head of navigation at that time. These companies didn't buy their stumpage on the open market, so I didn't.

By open market I mean when a piece of timber is publicly offered for sale and sold to the man that will pay the most for it. The way the Government sells its timber.

I know what the going price for white pine stumpage was in the locality between Avery and St. Joe, the timber being tributary to the St. Joe, where the timber was bought by lumber companies from settlers.

"NOTE.—Mr. Lingenfelter objected to the question as to the going price for white pine stumpage in the locality where the timber was bought by lumber companies from settlers, for the reason that the set-

tlers in that locality sold, no doubt, on forced sales, and a sale by a settler would not furnish a basis for fixing the market value of the timber."

Q. What did Flewelling and the Monarch Timber Company pay to the settlers per thousand for white pine stumpage on Mica Creek?

"NOTE.—Mr. Lingenfelter objected to the question as to what Flewelling and the Monarch Timber Company paid the settlers for white pine stumpage on Mica Creek, for the reason that it does [203] not furnish any basis for fixing the market value." See page 43 of the said testimony taken at Coeur d'Alene.

A. The price varied.

Q. What was the maximum price that he paid settlers?

A. If the settler's title to his claim seemed pretty good, so that the risk wasn't great in the transaction, and the timber was a fair quality, as high a price as $2.50 per thousand was paid.

(Answering questions as to whether the Flewelling and McGoldrick Lumber Companies only bought the stumpage from settlers after the title had been examined and passed by their attorneys, witness said:)

No, sir; it is a fact that the low values paid for stumpage owned by settlers and homesteaders is in quite a measure due to the questionable titles that have often arisen; and to the fact that even after patent is issued that the Government may contest [204] the case; and also to the fact that these set-

(Testimony of Door Skeels.)

tlers' claims are scattered; that they cannot get the timber all in one body and that the settler has little means and is often forced to sell his timber at a low price.

Q. Can you tell us of a single specific case where there was a reduction in the price made because of the statute of the title?

A. I know of two cases in which the Bonner Ferry Company bought timber from claims on the Kootenai River for a very much lower prize because the title was questionable.

I do not know of any specific case on the St. Joe River where there was any depreciation in the price made because of the status of the title, only in a general way.

In almost every case in which timber is bought on the homestead, that tends to lower the selling value of the timber.

I do know of cases, but not on the St. Joe River, but it is a well known fact that it is the reason why timber on homesteads and claims sells for a lower price than the timber on the open market.

Q. You mean public auction?

A. Yes, timber publicly offered for sale.

I was engaged personally in driving logs on this St. Joe River only in this way, that I exercised supervision over cutting of the timber and removing it from the forest in the neighborhood of Avery—I had nothing to do with the actual labor of driving it nor with the payment of the cost of the timber. I have been engaged in the actual lumbering operations, in

(Testimony of Door Skeels.)

this St. Joe country, in the cutting, skidding, banking and driving, in behalf of the Government, and I watched the costs in logging and made records of the costs in logging. It has been part of my work ever since I have been in the forest service to make note of such things.

Q. The Government has never engaged in any skidding of logs into the water or banking or driving them? [205] A. Yes, they have.

Q. In this St. Joe country? A. No, sir.

Redirect Examination by Mr. LINGENFELTER.

I have had experience in logging and in examining logging streams.

Any stream to be used for logging requires some repairs to be made on the stream—I would like to qualify that by saying that the driving can be done much better and much cheaper and larger drives can be taken out by making repairs to the streams and it is always the custom to make such repairs before driving a stream of any kind. Even the best driving stream in the country has many repairs made to it to make it better.

NOTE.—Mr. Dudley, in behalf of the defendant, objected to testimony as to any money having been paid in recognition of the liability of the company for the damage done, for two reasons: first, any payment of that kind would be in the nature of a compromise and therefore not admissible in evidence; second, no case where money has been paid for a trespass is involved in this action.

Mr. Day came to my office in Wallace. I was act-

(Testimony of Door Skeels.)

ing as Supervisor of the Forest; a few days after the fires in July 1908 and 1907—Mr. Dudley objected to what Mr. Day said—said that the company would like to use all the timber that had been killed by those fires, and that he would like to know, in case the company did use that timber and pay for it and it was cut and scaled at the value of green timber, if I would recommend to the forestry that we drop action against them for damages caused by the fire. I told him that I would make such a recommendation in case the company would purchase all of the burned timber and use it and pay for it at the value of green timber. And Mr. Day made the first payment of $3,600.00 with that understanding. He went out of the office to get the money and when he came back he informed [206] me that he had drawn a sight draft on the president of the company for $3,600.00, and that one bank refused to give him the money for it, and he took it to the other bank and they did and he bought a draft on the New York bank, drawn payable to the Fiscal Agent at Washington for $3,600.00, and he mailed it to my office with a letter of transmittal which I made out for him as the first payment.

Afterwards in recognition of this agreement and payment, they cut tie timber at the fire which occurred through the Burns & Jordan camp, the value of only part of that payment, and they had trouble in getting tie contractors to make the ties, and they finally stopped the work when they had cut ties to only a value of a part of that payment, and left the

balance on deposit. It is on deposit yet.

With reference to these large timber companies purchasing timber in these localities, they purchased usually in 160 acre tracts, and by purchasing a number of tracts, they secured a large tract.

After they have purchased a large tract they are in many cases able to absolutely control the market so far as the value is concerned.

The railroad destroyed nearly all of the timber that they cut from the additional strip on the right of way. Some of it they just cut and throw back off of the strip into the forest, and let it lay as a source of danger from fire. A part of it they hauled down the right of way to the lower side and burned it up in heaps along there, and in some cases they used it in the construction of the railroad, but very seldom. Mr. Day stated that it wasn't practical—

Mr. Dudley objected to what Mr. Day said—

Mr. Day stated that he hated to waste so much good timber; that it wasn't practical to use that timber until the construction of the railroad reached that point, and there wouldn't be any place to keep it; it would be in the way there in the meanwhile. [207]

Recross-examination by Mr. DUDLEY.

Q. Did he state why he cut this timber that he couldn't use?

A. Yes, he said he cut it to get it out of the way; that was the substance of a great many conversations that I had with him about it, that he had to get it out of the way of the grading of the railroad, trestles, etc. This timber outside of the 200 ft. right of way

(Testimony of Door Skeels.)

was in the way in some cases—in some cases it was not.

It was the understanding during the summer of 1907 that they were cutting some of that timber outside of the 200 ft. right of way so as to prevent fire starting in accordance with the regulations of the department.

This timber which was burned at Burns & Jordan's camp I have included in my estimate of the amount of timber burned, that is the fire I have spoken of.

Q. And this $3,600.00 that you spoke of has been paid to the Government on account of that burn?

A. As a first payment towards the damage done by all the fires; there wasn't any particular reference to one fire.

I think the Government has given the railroad company credit for that $3,600.00 in these claims. I do not know.

One of these small streams tributary to the North Fork which I have spoken of as being navigable in the natural condition near the mouth is so only in high water. That high water lasts only from two to three months; it lasts longer on some of the streams than on others.

Witness excused.

Mr. LINGENFELTER.—Now, Mr. Dudley, it is admitted that the title to the land over which the timber was cut from the right of way and the land of Coeur d'Alene National Forest Reserve is in the Government.

Mr. DUDLEY.—The title to all the land is. [208]

[Testimony of Richard H. Rutledge, for Complainant.]

RICHARD H. RUTLEDGE, a witness for complainant, after being sworn, testified as follows: (Examined by Mr. LINGENFELTER.)

My name is Richard H. Rutledge. I reside at Missoula, Montana. I am in the Forest Service. In 1907 and 1908, I was Supervisor of the Coeur d'Alene National Forest, from February 14, 1907, to October 15, 1908.

I was superviser during the construction of the Chicago, Milwaukee and St. Paul Railway through the Coeur d'Alene National Forest Reserve.

I received a copy of what is denominated the "Peck Agreement." I received a telegram a few days previous to receiving the agreement informing me that they had executed that agreement and to allow construction.

It allowed advance construction, and to supervise clearing and piling of brush and scaling the timber.

I acted on what we call the "Peck Argeement." I had conversations and correspondence regarding the "Peck Agreement" with Mr. Day and other agents of the Company.

NOTE.—Mr. Dudley, on behalf of the defendant, objected to testimony as to whether or not it was generally understood among the agents of the railway company and the witnesses that the provisions of the Peck agreement would be carried out.

During the year 1907, it was the understanding among the agents and myself that the provisions of

(Testimony of Richard H. Rutledge.)

the Peck agreement would be carried out.

I was familiar with the timber that was cut from the right of way, it was small saw timber, largely white pine, some proportion of red fir, tamarack, cedar and other species. I was acquainted with the market value at that time of timber of that character. I base that market value upon the result of investigations made by Mr. Skeels at my direction. Of my own knowledge I know of actual sales having been made of timber similarly located and of like character. I had personal knowledge during the year 1907 of seven or eight sales. **[209]**

From my knowledge of that timber and of sales having been made, I would say that the reasonable value of the timber that was cut from the right of way was $4.00 per thousand feet board measure.

I know the elements of cost that enter into the manufactured product of that timber.

Q. Can you state?

(Mr. Dudley objected to as immaterial in the nature of the cross-examination of the witness.)

The manufactured value of the timber was from $23.00 to $30.00 per thousand ft.—the value of the same classes of timber f. o. b. in the region along there, Wallace for instance.

I know generally the cost of cutting and planking, logging, taking down the stream.

Q. How can you arrive at the manufactured value that way, I mean the stumpage value?

Mr. DUDLEY.—All this is subject to my objec-

(Testimony of Richard H. Rutledge.)
tion as immaterial and cross-examination of the witness.

A. The cutting would be approximately eighty cents; the skidding would be $1.50; if the timber were so located that it was necessary to chute it to the stream, it would cost probably seventy-five cents a thousand to chute. The construction of the roads would probably cost ten cents per thousand; decking on the skid roads would cost twenty-five cents. If purchased under Forest Service regulations, the brush disposal would cost fifty cents; the sawing of the timber would cost $3.50; the administration and other charges would cost possibly thirty-five cents.

In that region the cost of the lumber at the mill would be about $9.00 per thousand.

The value of the manufactured product would be approximately $18.00.

I have not added the stumpage to the cost. This is just the cost of manufacturing. The cost of stumpage would be **[210]** $4.00 a thousand. To a certain extent I am familiar with the burned district testified to by Mr. Skeels.

I was on the scene of the "Loop" fire or the Kelly Creek fire soon after it started, but I didn't go over the area very extensively, nor make an examination of that timber.

I know where the fires originated.

Q. Will you state where?

A. Along the right of way in connection with their burning.

The contractors started those fires.

(Testimony of Richard H. Rutledge.)

I am able to state that the contractors started the fires, from the fact that they were using fire in their burning at those places right along, practically continuously, and that there was no other visible source for the fire.

I was able to trace the fire by its course from the right of way to the points where it spread.

I am familiar with the value of that timber in there. The reasonable market value of that timber was $4.00—stumpage value.

I didn't estimate the amount.

I am familiar with the St. Joe River and its tributaries, the North Fork—only became familiar with it during the period of construction. I examined it before the road was completed.

NOTE.—Mr. Dudley in behalf of the defendant interposed an objection to a question with respect to the character of the stream, on the ground of its incompetency in relation to the issues in this case, and because any damages done to the stream would be properly the subject of an action at law and cannot be gone into in this action in equity.

The stream was a drivable stream. After the road was constructed it was not drivable without removing the obstructions from the construction of the road.

I know that the Chicago Milwaukee Railroad Company placed those obstructions in the stream. In our examination we could **[211]** determine the places at which rock had been thrown into the river.

(Testimony of Richard H. Rutledge.)

I was there in 1908 and saw the blasting actually going on and the rocks being thrown in.

Cross-examination by Mr. DUDLEY.

I had not cruised any of this timber that was burned over before it was burned, nor made any special examination of it personally.

The value of that timber would depend upon the quality and character as well as the location.

Q. And not having personal knowledge of the character and quality of that timber, you haven't personal knowledge of its value, have you?

A. I have satisfactory knowledge of its value from the reports.

I didn't have personal knowledge of its value.

In giving these items of the cost of manufacturing the timber I have omitted the cost of driving. That would be about $1.50. That would be from a higher point than Avery.

I also omitted the charge of the St. Joe Boom Company. I don't know personally how much those charges are. The cost would be in excess of $9.00.

The market for all of this timber is along the Coeur d'Alene Lake. I was not personally familiar with the cost of saw logs in Lake Coeur d'Alene in 1907 nor in 1908, except through the reports made at my request. I did not make a personal examination.

I was not personally familiar with the going price which the lumber companies was paying for stumpage tributary to the St. Joe above the head of navigation in 1907 and 1908, and buying of private owners or settlers.

(Testimony of Richard H. Rutledge.)

I did not personally see any of these fires start.

Redirect Examination by Mr. LINGENFELTER.

Q. Do you want to leave the impression that where the chutes were used the skidding would be $1.50?

A. Yes, it might cost $1.50 to put them on the chutes. **[212]** Use of the chutes would reduce the skidding cost.

Recross-examination by Mr. DUDLEY.

In these items also we included no interest on the plant invested in the logging operations; that would be included in the administration and the other charges, thirty-five cents.

Q. That only referred to sawmill administration, did it not? Not the cost of the plant by the lumber and timber mentioned?

A. Yes, it included the entire outfit.

There is no sawmill at Wallace. The lumber at Wallace is manufactured mostly down near Harrison and then shipped up there by rail.

The market value of manufactured lumber at Wallace represents the cost of rail shipment in addition to the cost of the mill manufacture.

These were the prices paid by the lumber yards there; it was not the retail price in 1907.

Witness excused.

[Testimony of George Hamilton, for Complainant.]

GEORGE HAMILTON, being called on behalf of the complainant, and being sworn, testified as follows on examination by Mr. Lingenfelter:

My full name is George Hamilton. My occupa-

(Testimony of George Hamilton.)

tion is forest ranger, and place of residence is Herrick, Idaho. I have been serving in capacity of forest ranger a little over three years. I had experience in logging. I have worked in logging camps and helped to cruise timber, and in fact followed timber from the stump to the mill since I was 14 years old.

I have continuously engaged in logging and lumbering business since I was fourteen years of age with the exception of about two years at intervals when I was on the Milwaukee survey. I was working on the survey of the Milwaukee road.

Before the construction of the road I was familiar with the St. Joe River and its tributaries and the North Fork from Avery up to the tunnel, the head of navigation—the Taft [213] Tunnel; St. Paul Pass Tunnel, that would be up the head of the East Fork of the River.

The condition of the stream was in its natural state, never was molested, never had been drove before, and I did not pay particular attention to the stream above the mouth of the Little North Fork; but I did think logs could be drove down there because I have seen so many other streams like it that could be drove.

I would say that the river below the Little North Fork down as far as Avery would be in my mind a good drivable stream before construction of the road.

NOTE.—Mr. Dudley objected to all the questions in respect to the condition of the river as incompetent to the issues in this case; they would be no

(Testimony of George Hamilton.)

ground whatever for equitable relief; that objection is to be understood as going to all these questions.

I believe it was a good drivable stream from there down before the railroad obstructed certain points along the river because I have seen a great many streams, and driven logs down that was worse to drive than that was.

Logs can be driven in high water with a small improvement on the river, but I do not think it could be driven in real low water.

With the improvements such as splash dams above to control the water, you could drive it most any time of the year. I made an examination of this stream since the construction of the road from the mouth of the Little North Fork down as far as Avery. I made it on April 9th of this year.

Owing to the fact that the water was high and you couldn't get along the railroad very handy, which was along the bank of the river, I just walked along the grade of the railroad and I looked it over very carefully in my examination as to obstructions placed in the river by the Milwaukee Railroad Company. The Milwaukee road does follow the stream.

I made a memorandum of the different points of obstruction along the stream. **[214]**

Q. Now, you may take that memorandum and refresh your memory and state what the obstructions consist of?

A. At a point near the east portal of Tunnel 31, rocks rolled into the bed of the river. I don't know what section and township Tunnel No. 31 is in.

(Testimony of George Hamilton.)

The number was on the tunnel; every tunnel was numbered. (Referring to map of Sec. 7, Tp. 46 N. R. 6 E.) At that obstruction I found large and small rocks rolled in to the bed of the river; obstructed the river for driving logs. I was able to ascertain whether those rocks came from the right of way of the Chicago, Milwaukee Railroad Company—they looked like the rock that was on the dump and in the cut.

Rock that was in the river, placed by the company, were sharp, jagged rocks that was blown out by dynamite from the bluffs; the native rock in the river was covered with moss and they were not as sharp. Didn't look as fresh. The rocks in the river projected above the water and were of a different color than the native rock.

I made an estimate of what the cost of clearing that obstruction at Tunnel No. 31 would be—in my estimation the cost of removing that obstruction would be, I think, about $100.00.

It would take about thirty days' labor at $2.00 per day; the cost of powder, steel and other equipment would amount to about $100.00 to blow the rock out of the river and remove it.

The next point of obstruction was at the west portal of Tunnel No. 31 in Section 7.

The estimate of cleaning the river at that obstruction would be about $150.00; it is a small obstruction, small rock in the river placed undoubtedly by the Milwaukee Railroad Company.

I can tell the rock has been blasted out of the

(Testimony of George Hamilton.)

ledge or mountain because it is freshly cut and is newer color than rock that has been exposed to water for some time. **[215]**

The rock extends above the water so that you can see that from the embankment.

The next point of obstruction is at a point between Tunnel No. 31 and No. 32 (indicating on the map) and along between these two tunnels here some place.

The bed of the river is filled up there for about a quarter of a mile and they have obstructed the river for driving purposes. I think the rock came from the right of way of the Milwaukee & St. Paul.

There were rocks placed in the river since I was down there before on my previous trip and there wasn't any other company in there that I knew of between the time and the time I made my examination.

I think that I am able to state from the color of the rock and the formation that they came from the Chicago and Milwaukee right of way; the rock is the same in the river as from the dump by the side.

The reasonable cost for the removal of the obstruction at that point is $600.00.

The next point of obstruction is just below the west portal of Tunnel 32 in Section 18, Tp. 46 N., R. 6 E.

At that point there is large and small boulders thrown in the river from the right of way; the river at that place makes a sharp turn and on the south side of the turn the channel is partly blocked and you wouldl have to cut off a small point of land in

(Testimony of George Hamilton.)
order to get logs around there and make it drivable.

I think I am able to state that those rocks came from the dump of the Milwaukee railroad. I have made an estimate of $500.00 as the cost of removing the obstruction at that point.

If the channel was clear of the rock and the point cut off, the river would be free and open to logging.

The next point was down the river at the east portal of Tunnel **[216]** 33 in Section 24, Tp. 48 N., R. 3 E. At that point the bed of the river is filled with large and small rock for about a quarter of a mile; the cost of cleaning the channel would be about $700.00.

There are indications at that point of blasting on the right of way; there are several small cuts along there, and railway dumps and fills.

The next point is at the west portal of Tunnel 33. The river-bed here is filled with small rock caused from blasting on the Milwaukee right of way. The reasonable cost of removing that obstruction would be about $500.00.

The next obstruction would be between Tunnels 33 and 36. The obstruction at that point is small and large rock in the bed of the stream caused from the rock rolling down the dump into the river. The reasonable cost of removing that obstruction would be $50.00.

The next point is a quarter of a mile west of the Station Stetson, between Tunnels 33 and 36. That obstruction is large rock rolling into the river from fills along the right of way. The cost of removing

(Testimony of George Hamilton.)

this is about $100.00.

The next point is at the west portal of Tunnel 35. That obstruction is large and small rock in the river there, placed by the Milwaukee Railway Company; would cost about $300.00 to remove it.

The next point is the east end of Tunnel 36; large rock in the stream from the right of way; cost to remove, about $50.00.

Three-quarters of a mile above Avery the bed of the river is full of rock and the river has washed into the bank at the south side, making the river wide, with no channel; cost to clean the channel and put in breakwater is about $1,000.00. That is the last one.

The total cost of clearing the stream of the obstructions **[217]** and placing it in proper shape for logging down between the north Fork and the town of Avery from the estimate I made would be about $4100.00.

I have just considered what the cost would be to make it a drivable stream during high water only; that would not be the cost of removing all the obstructions placed in the stream by the Chicago Milwaukee.

Cross-examination by Mr. DUDLEY.

I was there in April last, the 9th of April, 1911. Prior to that time I was there in the fall of 1906.

These obstructions which I refer to have appeared in the stream between 1906 and the present time. I saw some of the rock put in the river myself in

(Testimony of George Hamilton.)

the spring of 1908. I was not over the river between 1906 and—I was just at a certain point above Avery three quarters of a mile.

The debris in the river as it now appears was placed there during the period of construction.

Between the cuts the fill would be so close to the river that the rock down the fill would roll into the bed of the river, blocking the channel.

If there had been slides at this point after the construction and no rock had been thrown in during the construction, it would not have the same appearance, the slides wouldn't come down to the right of way.

Q. The slides from the right of way wouldn't carry down into the river?

A. Yes, it would have the same impression.

The rocks sliding down the right of way from a high bank into the river is what I mean.

Q. You do not know whether it was from the construction or from the slides afterwards?

A. Yes, I do, because at certain points the rock was blasted into the river undoubtedly, because it was so far from the slides it wouldn't [218] have rolled in. That is at some points.

Witness excused.

[Testimony of W. G. Weigle, for Complainant.]

W. G. WEIGLE, being duly sworn, testified as follows in behalf of the complainant:

STIPULATION.

Mr. DUDLEY.—It is understood that the defend-

(Testimony of W. G. Weigle.)

ant objects to all testimony concerning the timber cut and the values thereof, the timber burned and the values, and the obstructions to the river, upon the ground that there is no equity in such matters and such evidence is incompetent and immaterial under the issues of this case. The above objection to go to the testimony of all the complainant's witnesses without further repetition.

(Examination by Mr. LINGENFELTER.)

My name is W. G. Weigle; place of residence, Wallace, Idaho; occupation, Forest Supervisor of the Coeur d'Alene National Forest. I have been acting as Forest Supervisor since October 15, 1908. I was on the forest from September 22, 1908.

I am familiar with the territory cut over by the Chicago-Milwaukee, its right of way across the Coeur d'Alene Forest Reserve. I have been over it many times,—not before the timber was cut off.

In 1907 I was not from personal knowledge familiar with the values of timber in that locality; I was in 1908.

I base the value upon timber sold in a similar location. All the sales that I am familiar with in the St. Joe are the few made by contractors. Half a dozen on the St. Joe. I am more familiar with those made on the Coeur d'Alene River than on the St. Joe River because I made those myself.

Based upon those sales and from knowledge of the character and quality of the timber, the reasonable market stumpage value of the timber cut over by the

(Testimony of W. G. Weigle.)
Milwaukee Railroad Company is $4.00 per thousand board feet.

I am familiar with the St. Joe River and its tributaries from the North Fork down to Avery and the Little North Fork, also [219] the East Fork. I have been acquainted with that stream since October 3, 1908.

Of my own knowledge I know whether that stream was navigable for logs prior to the construction of the Chicago-Milwaukee Railroad; from the character of the stream and the quantity of water that flows in it.

I have made an examination of that stream since the construction of the road and made a memorandum of the different points of obstruction. My memorandum was made on April 6, 1911.

Q. You may use that to refresh your memory and state what the different points of obstruction are on that strip, and what they consist of.

A. One hundred yards east of the confluence of the North Fork of the main river in Section 10, large boulders thrown in the stream. Those boulders came from the open cut in the railroad. I know that from the fact that the rocks have not been weathered and there is no other open place in the region from which rocks have been taken. They are the same character of formation as that of the rock along the right of way, same species of rock that you find in the right of way.

Approximately one mile north of the confluence of the north fork of the main St. Joe there is a large quantity of rock thrown in the river on the railroad

(Testimony of W. G. Weigle.)

right of way; a cut—what they call "daylighted"—was at this point; there was no other place that it could have come from but that point of the railroad because there is no excavation in the neighborhood and the rock is fresh rock, not that which you would find in the river, no moss on it. I saw the rock put in there myself in 1908.

Dynamite was used, then they would excavate and throw in. Of course the dynamite did the big damage. Masses of rocks thrown a distance.

The next point was at the east portal of Tunnel No. 36. The whole stream-bed closed with large rock. [220]

Q. What occasioned that obstruction?

A. The same process of blasting on the right of way.

The next point of obstruction is 300 ft. north of the east portal of Tunnel No. 35. That obstruction is very large boulders taken out of the middle of the channel; that is all I saw this time, on account of the muddy water, but having seen it before I know there is a large quantity of other rock in the river that I couldn't see.

The stream was not free of obstruction since I learned to know it. Before the construction of the railroad, it evidently was. Those rocks appear to have come from the right of way of the Milwaukee.

The next point of obstruction is the west portal of Tunnel No. 34.

I didn't see the stream prior to the construction of the railroad. Its present condition is—channel

closed by small rock which slid down from the right of way and evidently came from dynamiting the rock on the right of way. There must have been blasting, but surface indications do not show that.

The rock is the same formation; you can very readily tell the rock which has been exposed to the weather for some time and some that has been recently put there; the rock in the stream is not weathered. It shows it was taken from the right of way because there is no other place it could have come from in that region.

The next point of obstruction was the west portal of Tunnel No. 33. There the channel is more than half closed by small rock from the right of way of the Milwaukee Railroad making a sharp bend in the stream. The next point is the east portal of No. 33, at watertank, large boulders at this point; evidently came from blasting rock from the right of way of the Milwaukee Railroad.

The next place of obstruction is the west portal of No. 32; whole channel entirely closed with fine rock. [221]

At this point on October 3, 1908, I walked across the stream without touching any water. The water all filtered through the rocks; at the present time the high water flows over the top and a new channel is forming on the north side; however, the stumps are still sticking out of the water, a large number of them. It is very easily determined where the rock came from. I saw them do it. On October 3, 1908, they were blasting there.

(Testimony of W. G. Weigle.)

The next obstruction is one hundred yards north of the east portal of Tunnel No. 32, about one hundred feet east of the east end of bridge marked "DD" 250. Whole stream-bed entirely closed, causing dead water for several hundred yards upstream. Caused by blasting rock on the right of way of the Milwaukee railroad.

The next obstruction is at the west portal of Tunnel No. 31; large boulders in the middle of the stream; unweathered, showing that they were thrown by blasting on the right of way of the Milwaukee Railroad.

The next place was at the east portal of No. 31; south side of original stream-bed filled with rock; unweathered, showing that it came from the operations on the right of way of the Milwaukee Railroad immediately adjoining.

At east portal of Tunnel No. 30 large boulders thrown in middle of stream; these boulders are unweathered, having sharp edges, showing conclusively that they were thrown from the Milwaukee right of way in the course of excavation.

About 600 ft. east of Tunnel No. 30, river channel filled with rock which came from the same source as the other obstructions.

The west portal of Tunnel No. 29, approximately 600 ft. above the confluence of the east fork and the north fork of the St. Joe River, the whole channel of stream is entirely closed with rock which rolled down from the fill west of channel. I saw them working at this point on October 3, 1908. I made a

(Testimony of W. G. Weigle.)
closed by small rock which slid down from the right of way and evidently came from dynamiting the rock on the right of way. There must have been blasting, but surface indications do not show that.

The rock is the same formation; you can very readily tell the rock which has been exposed to the weather for some time and some that has been recently put there; the rock in the stream is not weathered. It shows it was taken from the right of way because there is no other place it could have come from in that region.

The next point of obstruction was the west portal of Tunnel No. 33. There the channel is more than half closed by small rock from the right of way of the Milwaukee Railroad making a sharp bend in the stream. The next point is the east portal of No. 33, at watertank, large boulders at this point; evidently came from blasting rock from the right of way of the Milwaukee Railroad.

The next place of obstruction is the west portal of No. 32; whole channel entirely closed with fine rock. [221]

At this point on October 3, 1908, I walked across the stream without touching any water. The water all filtered through the rocks; at the present time the high water flows over the top and a new channel is forming on the north side; however, the stumps are still sticking out of the water, a large number of them. It is very easily determined where the rock came from. I saw them do it. On October 3, 1908, they were blasting there.

(Testimony of W. G. Weigle.)

The next obstruction is one hundred yards north of the east portal of Tunnel No. 32, about one hundred feet east of the east end of bridge marked "DD" 250. Whole stream-bed entirely closed, causing dead water for several hundred yards upstream. Caused by blasting rock on the right of way of the Milwaukee railroad.

The next obstruction is at the west portal of Tunnel No. 31; large boulders in the middle of the stream; unweathered, showing that they were thrown by blasting on the right of way of the Milwaukee Railroad.

The next place was at the east portal of No. 31; south side of original stream-bed filled with rock; unweathered, showing that it came from the operations on the right of way of the Milwaukee Railroad immediately adjoining.

At east portal of Tunnel No. 30 large boulders thrown in middle of stream; these boulders are unweathered, having sharp edges, showing conclusively that they were thrown from the Milwaukee right of way in the course of excavation.

About 600 ft. east of Tunnel No. 30, river channel filled with rock which came from the same source as the other obstructions.

The west portal of Tunnel No. 29, approximately 600 ft. above the confluence of the east fork and the north fork of the St. Joe River, the whole channel of stream is entirely closed with rock which rolled down from the fill west of channel. I saw them working at this point on October 3, 1908. I made a

(Testimony of W. G. Weigle.)
request of President Williams of the Milwaukee road to have the channel [222] opened at this point, owing to the fact that it was diverting the stream from the old channel and making it practically impossible for a man to get along the wagon road. The stream, in 1908, at this point filtered through the rocks in time of low water, but in time of high water, spread out over the adjoining wagon road. The same condition is maintained during the summer of 1909 and 1910 and the same condition exists at the present time. That is the last obstruction that I have recorded.

I was very well acquainted with the market values of timber in 1907 owing to the fact that I was making examination of timber sales all over the western part of the United States, but nothing specific in the St. Joe River.

The timber business in 1907 was really better than it was in 1908 or has been since.

There were more applications for timber sales in 1907 than at the present time.

With the exception of the fire killed timber we are holding the price just the same as we did in 1907. The general market value for mixed timbers in 1907 was much better than at the present time. White pine alone very nearly the same; it is a staple, and also a ready market.

I am familiar with the timber owned by the Government tributary to the St. Joe River, the North Fork, the East Fork and the Little North Fork.

(Testimony of W. G. Weigle.)

The Government owned timber is easily five hundred million.

The Milwaukee railroad claims that they are open for hauling logs; however, the river is the main line of transportation, and that is the usual way of handling logs in this region.

The track of the Chicago, Milwaukee Railroad is on the uphill side in more than half of the places.

The country is rough in many places; to get up to the head of the East Fork the country flattens out more or less, but the [223] railroad is one series of trestles, tunnels and deep cuts, and wherever these cuts are made, it is impossible to get logs to the railroad, and in many of the ravines where it would be possible to get logs to the railroad, it has not any facilities, and the sharp curves make it almost impossible to construct switches into the ravines. The timber stands on a mountainous country and gradually slopes down into the gulches. The steepest hills would probably have a forty per cent slope. The average hill would probably have a twenty-five per cent slope.

Cross-examination.

(By Mr. DUDLEY.)

The wagon road I have referred to is the old "tote" used by the Milwaukee for construction purposes.

The half dozen sales made on the St. Joe in 1908 were made by the Government.

Witness excused.

April 13, 1911.

[Testimony of Joseph DeWitt Warner, for Complainant.]

JOSEPH DeWITT WARNER, called as witness on behalf of the complainant, being duly sworn, testified as follows:

(Examination by Mr. LINGENFELTER.)

My name is Joseph DeWitt Warner. I am in the employment of the forest service as Deputy Supervisor on the Helena Forest. I have been acting as Deputy Forest Supervisor about two years.

My territory at the present time takes in what is known as the north end of the "Big Belt" Mountains and two or three townships known as the "dry" range, and the group of mountains known as the "Elkhorn" and part of the main divide of the Rocky Mountains. That does not and did not include the Coeur d'Alene National Forest Reserve.

I was on the Coeur d'Alene National Forest in October, 1907, and remained until in April, 1908.

I was on the right of way of the Chicago-Milwaukee several times. [224]

I am familiar with the St. Joe River and its tributaries down to the forest boundary and was during construction of the Chicago-Milwaukee Railroad before it was completed.

I wouldn't think that the stream would be navigable for logs at that time. There was considerable rock and debris—there was more or less rock all the way from just above the North Fork down pretty near the forest boundary.

(Testimony of Joseph De Witt Warner.)

The rock came from above the stream where they had been blasted out by contractors in the employment of the Chicago-Milwaukee Railroad.

I noticed the blasting the first time I went along there; from time to time we were met on the road by men with red flags and had to stop while the blasting was going on.

I was on the right of way and saw the blasting eight or ten times. Sometimes it would be a week apart, sometimes two weeks, and sometimes I would go down there one day and right back the next. I have been over this line of railway within the last week. I observed the same rock in the streams that I saw the first time in 1907; they were in the same places where they were blasting.

I didn't see the river before they commenced working. There were not obstructions of any consequence at any other point in the stream except where the rock was thrown in by the railroad company, that I noticed.

The last time I was there I took some notes because I wanted to locate it more definitely in regard to tunnels which previously I didn't know the number of.

The memorandum I have here is not every place, but those I thought more important. The first place that I considered important was above the mouth of what we know as the Little North Fork, a stream coming in from the East Fork. It was below Tunnel No. 29, a couple of hundred yards above where the North Fork comes in. That is on the East Fork

probably two hundred yards above where the Little North Fork comes in. [225]

About 200 yards above Tunnel No. 30 there were some boulders in the stream, and about a mile up at the east portal of No. 30 there was boulders, and just above Tunnel No. 31, and then above Tunnel No. 32 and also just above the trestle there the river bed was dammed up considerably. And above and below both portals of Tunnel No. 33, and just below the west portal of Tunnel No. 34, there was considerable small rock in there, and then above Tunnel 35 and 36, both tunnels, just below, maybe less than a quarter of a mile below the mile-post that was located one mile from Avery. There was considerable damage done there. The mile-post was above Avery and this was between the mile-post and Avery; those are the points that I noticed particularly.

I was able to characterize these rocks to my own satisfaction as having come from the right of way, on account of being the same character of rocks that was in the cuts and they were ragged. The rocks that had been in the stream some time, some of them, were worn with water and there was a sort of moss on some of them, and they were old looking rocks rather than a new rock. I could distinguish by the color in some instances; the way I distinguished mostly was by the looks of the rock in the river as compared with that in the cuts and from the looks of rock that are new and from being worn and having moss that had been in the river.

(Testimony of Joseph De Witt Warner.)

Cross-examination by Mr. DUDLEY.

I left there in April, 1908. The blasting was not entirely completed then.

I don't know whether any of the rocks that were in the river went in as the result of slides rather than from blasting; I don't know that they did.

Q. You don't know if they did or not?

A. I didn't notice any place where I considered that they had gone in that way.

Q. A slide would carry down the blasted and broken rock which would be on the right of way? [226]

A. I suppose it might in some instances.

If there has been any slide after the first construction of the right of way carrying debris down into the stream consisting of rock blasted out, it would be the same character as the rock carried into the stream directly from the blasting.

I was on the right of way in 1909. I don't know of any rock thrown into the river since June, 1909.

The places where I saw rock when I made my recent investigation is the places where I saw them blasting in 1907 and 8.

The general character of the stream, the size of it, swiftness, is a typical mountain stream. I had never been over it before the railroad was working there. It is more or less of a canyon all the way above Avery. What I consider as more typical is where the banks are steeper and there is not as much river bottom. The banks are quite steep along there, but not as steep as I have seen a great many canyons,

(Testimony of Joseph De Witt Warner.)

what we term canyons in the east.

That entire mountain range is a very precipitous mountain range, very steep and rocky.

I would say that above Avery after you get into the North Fork, the tops of the mountains are about one thousand feet above the stream in places. At the junction of the North Fork and the East Fork, the main divide is one thousand feet high.

Redirect Examination by Mr. LINGENFELTER.

There is a good current in the stream. I can't remember any big rapids in it although there are places where there are ripples; there are considerable little rapids along there.

I think that if the rocks I have testified to were removed, the stream with slight repairing could be put in shape for navigation of logs.

[Testimony of Charles H. Gregory, for Complainant.]

CHARLES H. GREGORY, a witness in behalf of the complainant, after being duly sworn, testified as follows:

(Examination by Mr. LINGENFELTER.)

My name is Charles H. Gregory. I reside in Fromberg, [227] Montana. I am a lumberman for the forest service; have been for about three years.

I have had to do with logging operations, woodwork, milling; probably twelve or fifteen years' experience. In the construction business, logging and lumbering I have had charge of some large operations, The largest was the J. H. McShane Pine Lumber

(Testimony of Charles H. Gregory.)

Company in Wyoming.

I did have occasion to examine the St. Joe River and its tributaries from the Little North Fork to a point from the East Fork down to Avery, the 9th day of this present month, April. At that time I was with Mr. Henderson, Mr. Skeels, Warner, Seery, Hamilton and Rutledge, and this gentleman here (Kottkey).

The object in exploring the stream at that time was to note the damage that had been done to the stream from the shooting of rocks by the Milwaukee Railroad. I made a close examination. I made a memorandum and have it with me. I didn't take any note above the mouth of the east fork.

At the east portal of Tunnel No. 31, large rock from the right of way shot over the channel sufficient to jam logs. I made an estimate of the cost of the removal of those rocks at about $100.00.

The next point was the east portal of 32, practically the same condition, estimated cost $100.00.

The west portal of Tunnel 32, channel obstructed with rock, estimated cost, $800.00. East of Tunnel 33, channel obstructed with rock from right of way, estimated cost to remove or clean same, $500.00. West portal of 33, numerous large rock in stream, estimated cost, $200.00. Three-eighths of a mile west from 33, rock from right of way, $100.00. West portal of 34, rock from right of way, estimated cost $200.00. Six hundred feet west of Tunnel 35, channel badly choked, large rock in river bed, cost to remove $400.00. At the west portal of the tunnel,

(Testimony of Charles H. Gregory.)

channel choked by rock, $100.00. East of Tunnel No. 36, rock in bed from right of [228] way, obstructing channel, cost to remove $200. One-half mile west of Tunnel 36, channel has been changed and creek-bed narrowed and choked by very numerous large rock in channel, cost to clean $400.0. Six hundred feet farther west from this point, heavy cut has been daylighted, entire channel about fifty feet wide has been filled with rock, cost to put in driving condition $1,000.00. Those are the only points that I took note of, making a total cost of $3,500.00, I think.

In making this estimate all I took into consideration was the removal of just a sufficient number of rocks to place the stream in a navigable condition. I did not estimate taking out all the rock.

I was able to identify these rocks as having come from the right of way. The distinguishing features which led me to believe that they came from the right of way were the difference in color, and the fact that the rock has been exposed to the elements; it is covered with moss, a darker color, smoother; these rocks that had been shot from the right of way were jagged and rough, the same formation you find up in the cut where they had been shot out.

If the expense I have mentioned were incurred, the stream would be put in condition for navigation of logs at a medium stage of water so that logs could be floated probably sixty days of each year.

I know that there are large bodies of timber belonging to the government tributary to the St. Joe

(Testimony of Charles H. Gregory.)

River along the North Fork and the Little North Fork and the East Fork. There is no means of transportation for that timber except the stream.

Cross-examination by Mr. DUDLEY.

I was over the stream the 9th of this month; that is the first time I have been over it from the mouth of the North Fork down, except by rail.

I was over that country quite extensively last fall on the head waters of these ranges after the fire. The timber was in about the [229] same condition then as now.

It is a National Forest and I suppose the timber belongs to the Government. I have not investigated the question of title, nor where the boundary lines are.

That country was pretty badly swept by fires last fall. The timber is practically all killed.

I was not at all familiar with the stream before the road was put in there and know nothing about what its natural condition was prior to the building of the road except as I see it now; I think I know the condition of the stream previous to the building of the road.

Q. That is a typical mountain stream, isn't it?

A. It is what I consider a smooth—it is smoother than the average mountain stream, free from boulders, falls and the like. It has a good strong current, but not a rapid stream for a mountain stream. There are some ripples in places; very few places where there is any shallow water, where it is fast enough to make much shallow water.

(Testimony of Charles H. Gregory.)

I should judge the channel is from 40 to 60 feet.

Q. And about how deep?

A. Probably now from three to four or five feet.

I hardly think there is a place there but what there would be two feet of water, perhaps more.

The mountains on each side of the stream are somewhat precipitous.

The obstructions testified to were placed in the stream during the construction of the railroad, but I don't know at what particular dates. I was not present at that time. Just the inference I draw from the appearance of the rocks.

Redirect Examination by Mr. LINGENFELTER.

A large part of that burned timber is merchantable; we are selling considerable timber of the same kind.

Recross-examination by Mr. DUDLEY. [230]

I think that I have made a sufficient examination to be able to estimate the quantity of merchantable burned timber. There is probably two hundred millions or more.

Q. As a practical business operation, how long would it take to get out two hundred million feet if the stream were in a driving condition?

A. That would depend on how big a force they had and how fast they worked and how many contractors there were there. I don't know as I can answer that.

I think timber companies take into consideration to some extent, in manufacturing lumber, the condition of the market and avoid overstocking the market.

Taking that into consideration and assuming that

(Testimony of Charles H. Gregory.)

the stream would be drivable, it could be taken out in one year, or they could take five to get it out. It is just up to the operator. I presume that timber, some of the species there, would be good for a number of years, probably six or eight.

Q. Take white pine.

A. I presume three or four years. Fir the same length of time, or a little longer,—red fir.

It will deteriorate more or less every year.

Redirect Examination by Mr. LINGENFELTER.

I presume if it was all cleaned up there would be all told on the two tributaries, the Little North Fork and the East Fork, about five hundred million feet.

Witness excused.

[Testimony of Henry F. Kottkey, for Complainant.]

HENRY F. KOTTKEY, a witness in behalf of complainant, being duly sworn, testified as follows:

(Examination by Mr. LINGENFELTER.)

My full name is Henry F. Kottkey. I reside at Grand Forks, Idaho. I am in the forest service in position of forest ranger. I have been acting as ranger since June, 1907. My duties are to [231] protect the forest from fire and also to keep track of all trespasses that may occur in my district. I did have occasion to patrol the St. Joe river and its tributaries. I started there in June, 1907, and I am there at present. I observed the condition of the stream before the road was constructed. I have had experience in the logging business, working in lumber camps and also on drives. I worked out in that business when I was sixteen years old until about

(Testimony of Henry F. Kottkey.)
twelve years ago; that would make it about eighteen years. I have worked on a good many different streams but never to ascertain whether they were suitable for logging.

The condition of the North Fork of the St. Joe River before there were any obstructions put in, you could have toted down a good lot of logs every spring there for about two or three months.

I have observed the condition of the stream since the road was constructed. It is filled with rock and boulders coming down from the right of way of the Chicago, Milwaukee & St. Paul Railroad Company.

I did see the construction in operation. Did see blasting there; blasting done all along the mouth of the North Fork to the west portal of the St. Paul Pass tunnel down to the mouth of the North Fork. There was no blasting done at Avery.

As I went along on my duties, some days there was blasts shot off that threw any amount, say hundreds of tons, into the river in some places, and other places again where it has filled the river—has obstructed the river and it can't be seen, and at the same time would hinder the logs coming down the river in low water.

I made notations of what I observed when I inspected the stream April 8th, this year, and have the notes with me.

Fill at Sec. 5, Tp. 46 N., R. 6 E., consisting of rocks and boulders which came from the right of way of the Chicago, Milwaukee & St. Paul Railroad.

Fill at Bridge 18, rocks and boulders which came

(Testimony of Henry F. Kottkey.)

from the [232] right of way of the C. M. & St. P.; large boulders at the east portal of Tunnel 31; large boulders in stream at the west portal of Tunnel 31; at bridge 25 stream partly filled with rock; west portal of Tunnel 32, river filled with rock; stream at Tunnel 33, large boulders in stream; at Tunnel 33 river-bed partly closed with small rock; at Tunnel 34 river-bed filled with rock; about 350 feet east of Tunnel 35 large boulders in stream; east of Tunnel 36 large boulders in the river; about a mile from where the North Fork enters the St. Joe River, large boulders in the river.

I did say that at these different points of obstruction I saw the blasting going on and the rocks rolling into the stream from the right of way of the Chicago, Milwaukee.

The character of the country tributary to this stream is a mountainous country, but there is no place but what I can start off from the river and go to the top of the summit without climbing up steep bluffs. It is what I call a gradual slope. The gradual incline extends back in some places three or four miles.

The Government owns large bodies of standing timber in that section of the country tributary to this strip.

It seems the only reasonable transportation would be the stream. I am familiar with that country. There ars no slides from the mountains down into the stream— I want to correct that, there was snow slides. No rock slides.

(Testimony of Henry F. Kottkey.)

The rock I have described as being in the stream certainly came from the right of way of the Chicago Milwaukee.

Practically all the fires, but one, I had in that district, which was a good many, could have been traced, for I have seeen a good many of them, started from the right of way of the Chicago, Milwaukee & St. Paul Railway Company. Ever since they started the construction work.

In some places the brush was piled fairly good, where the work wasn't so hard, and in some places it was just thrown down into [233] the forest on the lower side of the right of way and left.

All of those fires originated from the brush burning or from sparks from the locomotives which fell into the brush.

(Testimony of Henry F. Kottkey.)

Q. Have you any notation as to dates?

A. I have just the monthly reports. The reports were made sometimes the date the fire occurred, or just as soon after as I had time to make them. The facts were fresh in my mind at the time they were made.

I couldn't state positively how soon after the fires occurred I made the notes. After the fires occurred, —not any longer than a month at the outside; we were supposed to send in reports every month. Probably there wasn't any made a month after. Still I would have kept a daily record in my books which were burned up last fall, from which even though it were a little longer than I generally would let it go to make it up, I could take the notes out of my books. I did take from my daily record and transcribe them into the report that you have now before you. That is the way those reports are made up; my notes I made while I was at work while I did observe, and then put them on to those records. Those original notes were burned up in the fire last fall, but they were transcribed shortly after they were made.

In 1907 there was at least six or seven fires that originated on the right of way. All them fires I have spoken of originated on the right of way.

There was one fire at the camp of G. O. Foss & Company where a man had been washing his clothes and left a fire burning; that was one fire that did not originate on the right of way. It went over the right of way and burned timber on each side.

Q. Now, locate the subdivision of that burned dis-

(Testimony of Henry F. Kottkey.)

trict. You can look on this big map and describe it from that.

NOTE.—(Mr. DUDLEY.) I desire the record to show that Mr. Skeels was pointing out the place of the fire for the witness. [234]

A. That would have been east of Tunnel 34, on both sides of the right of way—it would be in Sec. 35, Tp. 46 N., R. 5 E.

I think the territory burned there was about 30 acres.

Cross-examination by Mr. DUDLEY.

When this Foss fire I testified about started I was in that locality, but not right there at the fire. What I have said of the manner in which they started was what I learned from inquiry from men there.

NOTE.—Mr. Dudley moved to strike out that part of the testimony as hearsay.

I can recall where the first fire was in 1907; I just about could describe the place but not by legal subdivision. It was Kennedy & Frazier's work at the mouth of Turkey Creek. When that fire started I was patroling the lower end of the right of way down to the wagon road and a man came on horseback to notify me that there was a fire that got away from a man that was working there at Kennedy & Frazier's. When I went down there it had burned over considerable, for about five or ten acres. You could trace this fire; fire leaves a track. I didn't see it start.

Frazier and Kennedy were contractors working on the road for the Chicago-Milwaukee & St. Paul.

The next fire that I recall in 1907 was from Charlie

(Testimony of Henry F. Kottkey.)

Johnson, contractor, his works. That was east of the mouth of Kelly Creek. When it started I was about —I guess about three or four miles of the place where the fire started.

I had been there that forenoon and seen the men burning the right of way, and of course, I draw my conclusions that when the fire got away, it came from there.

Q. That was your conclusion, but you didn't see the fire started yourself? A. I wasn't there.

Q. Did you personally see any of the fires started?

A. If I had been there when they started, they wouldn't have got away— [235] there wouldn't have been any fire. Certainly I wasn't personally present when any of the fires started.

I do not know of my personal knowledge how any of them started,—what caused the particular fire. They all started near the contractors' works.

The same is true of the fires that were started in 1908.

Q. Do you remember when they got through the construction work there on the right of way? Blasting up there?

A. The fact is that they are not through yet. The steel was laid in November, 1908, up to about Falcon, six or seven miles below the east portal. That is all above these obstructions in the river that I have referred to.

The blasting I saw, by which those rocks and debris were thrown into the river at the different points I have described, was all done before the steel was laid.

Witness excused.

[Testimony of Otto F. Hanson, for Complainant.]

OTTO F. HANSON, called as witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. LINGENFELTER.

My name is Otto F. Hanson. I reside at Missoula, Montana. My business is running a little fruit farm. I am familiar with a part of the St. Joe River and its tributaries. I first saw that stream in the forepart of June 1908 while the Chicago-Milwaukee was constructing its line of road. I saw the North Fork right below where the Little North Fork runs into it. I traveled down the East Fork as far as Avery, but I wasn't familiar with it.

I saw a whole lot of men at work. They were blasting. The rock went into the North Fork at about five different points that I noticed every day. It went into the stream different ways; there were some places where they hauled it out of the tunnel and dumped it in and there was one place in particular where they blew up the side of the mountain where it all went in at once, pretty nearly all, and it obstructed the river by hundreds of tons. **[236]**

I have had little experience with logging; that experience was mostly the sawing of logs, the milling of logs and hauling them to the stream and dumping them in. That experience extended over eight or nine years.

I have had experience in preparing streams for the driving of logs.

As to this stream being navigable for logs prior to the construction, I would say it was good, compared

(Testimony of Otto F. Hanson.)

with the streams that I have helped to prepare.

As a general rule, some repairing is required if a stream has never been drove before.

I did have occasion to pass up and down the right of way of the Chicago-Milwaukee in 1908. I was living in that vicinity.

Q. Did you see any fires?

A. I saw one in particular.

It originated about three hundred yards from where I was living; it kept me fighting fire for a while.

Q. Was anybody in charge of it?

A. A fellow by the name of Charlie Lovett (?), I think was his name.

That fire started about 200 yards west of Tunnel 30 on the right of way. It burned over about forty acres.

Q. See if you can describe that burned territory.

A. Right here. (Indicating on map.)

NOTE.—Witness points to place in SE. ¼ of Sec. 7, Tp. 46 N., R. 6 E.

Most of that area was covered with small timber.

Cross-examination by Mr. DUDLEY.

By small timber I mean small growth; it went all the way from pretty near brush up to six or eight inches. It was lodge pole, yellow pine and fir, all mixed.

We were running what was called the "15-mile house," where people could put up their horses, and fed people traveling up and down. [237]

Q. A saloon?

(Testimony of Otto F. Hanson.)

A. Could get a little once in a while, I guess.

When the fire started I was in my place of business. This man Lovett was working under the contractors—Sturtevant & Proctor. I saw the fire get away from him and I saw him burn the brush. I happened to be looking at him when the fire got away from him because he had just been down for a little drink of water just before that.

Q. Was the water taken as a chaser?

A. I didn't notice what he did take first.

Witness excused.

[Testimony of Daniel Francis Seery, for Complainant.]

DANIEL FRANCIS SEERY, called as witness in behalf of complainant, was sworn and testified as follows:

Direct Examination by Mr. LINGENFELTER.

My full name is Daniel Francis Seery. I reside at Ogden, Utah. My business is lumberman for the Forest Service. Including the time I have been in the Government service I have been engaged in the lumber business, thirty years. My experience consists of logging in all its phases, driving logs, loading logs with steam horse, scaling logs, estimating timber, running lines and everything in relation to logs.

I have been employed by the Government about three years next July.

Q. I will get you to state whether or not you have had charge of large operations, men under your employment.

A. I have been logging superintendent for the

(Testimony of Daniel Francis Seery.)

Burlington Lumber Company for fourteen years, and during that time our logging operations extended from 35 million a year to as large as 60 million a year.

My estimates have been acted upon by these various lumber companies.

In examining the sale areas where a purchaser would apply to buy timber from the Government, I look over the area and estimate its accessibility, the stumpage value, market value, means of getting the timber out, and so on.

The first time I went down the right of way of the Chicago-Milwaukee was during the month of September, 1908.

I made an estimate of the timber that was standing on the [238] burned district near the right of way. I commenced on what was known as the "Loop" fire and worked in connection with the men appointed by the railroad company, and lumbermen and cruisers, also Mr. Baker. Mr. Day introduced Baker to me. Mr. Baker said he wanted us to get together upon the value to be placed upon this burned timber as soon as possible in order to pro-rate the amount of damages that each subcontractor would have to pay where fires occurred in the vicinity of their camps. Mr. Baker did go along with me in making this estimate. I made notation of the burned area and the amount of each subdivision. I took it by 40-acre subdivision and made an estimate of the various tracts of timber that was fire killed on each. I have that notation before me. That map was given to me by Mr. Day

and I compared it with the natural topography of the country as I traveled over it, and found the map was correct. The four blue-prints before me were handed to me by Mr. Day. I have examined them to ascertain their correctness. I find them very correct in every particular.

Q. Will you indicate upon the blue-print where the burned district was?

A. This dotted line commencing on the west side of Kelly Creek; by the indication on the ground I could see that the fire started close to the steel bridge they were constructing across Kelly Creek, Sec. 1, Tp. 46, R. 7. The fire ran north and the west side of Sec. 7, north up Kelly Creek, and extended into Section 6, same township and range, across over in an easterly direction Section 5, same township and range, into Section 8; south to the west side of Section 8, crossing over in a northeasterly direction into Section 9, close to the Richmond mine, and east to the Monitor mine in Section 9, back in a southwesterly direction to the "Loop" in Section 8. This map I hold before me contains a correct description of the burned area as described by me, and the approximate acreage. This map was made by the railroad company. I made the notations and figures on there; that is, originally reproduced from the original tracing that I gave to Mr. Day. I mean the white figures. [239]

They were reproduced by Mr. Baker's subordinates in his office at Taft; we examined each forty, the part that was fire killed, counted the trees, averaged them, the different types of timber, and figured out

(Testimony of Daniel Francis Seery.)

particularly the amount, and then got together and consulted as to the amount, and came to an agreement as to the amount of timber that was killed and the various types that was killed. Mr. Baker and I did make an estimate of the amount of timber that was burned over on each subdivision, and that amount is correctly stated on that map.

I noted the amount of seedlings that was burned.

I talked the matter over with Mr. Baker and Mr. Long. I explained to them why it was that there should be a value placed on those seedlings and they eventually agreed that it was a valid claim, and they did not assume the responsibility for the fire, but they did for the timber that was destroyed and eventually assumed the responsibility for the fire.

NOTE.—(Mr. DUDLEY.) I move to strike out the statement that those parties eventually assumed responsibility for the fire, or stated that it was a valid claim against the company, for the reason that it is not shown that they had any authority to make such a statement that would be binding against the company, or to make any statement whatever that would be valid or competent in this case.

He stated in the presence of Mr. Day that he was there for the purpose of representing the company for the purpose of settling these claims, and he examined very minutely every single bit, by bit, compared these estimates, legal designation of each forty, the amount of acreage that was burned over and everything in connection with this map. He compared it with the original map and with his report.

(Testimony of Daniel Francis Seery.)
That was done with the knowledge of Mr. Day.

Mr. Day called on me frequently and called me up by phone—he urged me to hurry up with the preparation of those maps and [240] estimates, and I carried them down and delivered them to him at the Chicago, Milwaukee & St. Paul road at Taft. Mr. Long was there at the time. Mr. Long said he accepted these estimates. He did have knowledge of the estimates on this map. He consented to it.

This paper you hand me is my report, the amount of timber of the various kinds. That report was made October 12, 1908.

Q. Was it made at the time the estimate was made?

A. Yes, I compiled this report every night; I took it first upon a note-book and afterwards when I went in at night I wrote it in, in ink, here.

That comprises the legal subdivisions by forties of all the fires from the "loop" down to Arnold's camp —comprises the territory covered by the four maps.

No one assisted me in the preparation of this report, but Mr. Baker had an exact copy of it. We compared it and checked it over. When they were finished, I did deliver a copy of this report to Mr. Day.

NOTE.—Mr. Lingenfelter offered in evidence the report made by the witness which states the amount of timber that covered the burned area. Mr. Dudley objected on the ground that it is a self-serving statement, incompetent and not properly verified.

Mr. LINGENFELTER.—Exhibit No. 35 is to be copied into the record and the original returned to

(Testimony of Daniel Francis Seery.)

the District Forester at Missoula, Montana.

Copy of Exhibit 35 appears set out at the end of the transcript of the testimony.

Q. What does your report show to be the amount of the burned timber?

A. The amount of feet board measure of mixed timber comprises white pine, red fir, white fir, tamarack, cedar, hemlock and jack pine, and is 4,045,700 ft.

Q. What was the amount of damage agreed upon between you and Mr. Baker and Mr. Long? [241]

Mr. DUDLEY.—I object to that on the ground that Mr. Baker and Mr. Long have not been shown to have any authority to make any agreement in that behalf.

A. At $4.00 per thousand, $16,182.80.

The amount of seedlings was 1344½ acres, mixed seedlings at $10.00 per acre. I put that arbitrarily and I found since that it would cost more than that to reseed that area.

Q. What was the total amount agreed between you and Mr. Long?

Mr. DUDLEY.—I object to that.

A. $29,627.20.

Q. What did you take into consideration at $10.00 per acre?

A. I didn't take into consideration the cost of raising the seedlings in the nursery, the transplants. The method that I had in mind was direct seeding and I find that is not a success. It might succeed partially at least but it would take several years

direct seeding to produce the same results, and it would cost more in fact that way than by using transplants.

Using transplants it would amount to $14.00 or $15.00 an acre.

I didn't take into consideration the cost of caring for the trees. There might be another addition in reference to that as to those estimates.

These estimates that we made, Mr. Baker and I, upon that area is very conservative, very low in fact, and it was done with the fully understood idea that the railroad company was to utilize this timber just as fast as we had our estimates made.

They calculated to use all this timber for ties, for culverts and for fence posts along the right of way, and asked me to give figures as to the cost of logging it on the right of way for that purpose; I told them it would cost about $5.00 per thousand to land that timber down on the right of way.

Those four maps I have referred to were prepared by the draftsmen [242] in Mr. Day's office with his instructions; he came in and told them to prepare those maps for me and what I wanted them for. The correctness of these maps has been verified by me and also by Mr. Long and Mr. Baker. Mr. Day wasn't out on this. The maps are in the same condition that they were in at the time they were examined by me and Mr. Baker and Mr. Long. They approved the maps in their present condition.

Q. Whose signature appears on these maps?

A. H. B. Baker, cruiser for the Chicago-Milwau-

(Testimony of Daniel Francis Seery.)

kee & St. Paul Railway Company, and my own. I saw them signed at the time. I think it is usual where two cruisers work together in a case of that sort for them to sign for the purpose of identifying the maps, and it showed our estimates were correct from both view points. (Maps marked for identification Exhibits 36, 37, 38 and 39.)

Mr. LINGENFELTER.—I offer in evidence Exhibits 36, 37, 38 and 39.

Mr. DUDLEY.—We object to the maps as incompetent, not properly identified or shown to be connected with the company. No objection on the ground that these are blue-prints of the tracings.

As to the general character of the timber that was burned over with respect to size and its adaptability —when making this examination in company with Mr. Baker, we came to the conclusion that it would be best adapted for tie timber and bridge timber.

As to the cost of logging that timber—what could be logged—that is hauled down in round logs to the railroad or to the stream, the cost would be $5.00 a thousand. I would bring it down the East Fork of the North Fork at the "loop." Could take it to Coeur d'Alene if you wanted to at a cost of $5.00 per thousand to get the logs, skid them and haul them down to the bank of the river, and put them in the water; then the driving would commence after that. I can't give the separate items of the cost of transporting those logs to the market at that time. I didn't see the [243] stream any further down than Arnold's camp and I didn't consider the cost

(Testimony of Daniel Francis Seery.)
of logging fully in connection with ultilization of the timber as proposed by the railroad company; that would amount to about $5.00 a thousand.

Mr. Day asked me for figures, how much it would cost to make the ties and I told him it would cost ten or twelve or fifteen cents per tie to hew the ties up there; or I told him that he could put in a small portable mill and he could do it cheaper by hauling the logs by the railroad to the mill and sawing them up there; it would cost $5.00 per thousand for the logs for cutting, felling, hauling and skidding them.

Assuming that the North Fork is drivable, it would cost $5.00 per thousand to put the logs into the stream; $1.50 to drive them. I believe there is a company down at the mouth of the stream that handles the mouth down there and he charges extra for handling them; it would cost near $2.00 to get them down at the mouth of the St. Joe River. The other expense would be stumpage $4.00 per thousand for the logs—that is, the round logs could be delivered at say Coeur d'Alene for about $11.75 per thousand.

I made an examination of the East Fork of the North Fork between Avery and the North Fork of the Little North Fork from Arnold's camp up to the "loop" in October, 1908.

Q. What condition did you find the stream in at that time?

A. What directed my attention to the stream was when working on the fire up on the ridge overlooking Richmond Creek basin, I noticed at least a couple

(Testimony of Daniel Francis Seery.)

of hundred millions. At that time it was all green timber and I stopped to consider first the possibility of marketing that timber—in going down the stream I examined closely the East Fork of the North Fork of the river, where Richmond Creek enters that stream, and I saw there would be an excellent chance to put in a dam there. You could put in a dam there that would hold a head of 75 ft. of water in a sort of gorge. When the railroad company built [244] their trestle across there, they filled the bed of that stream in; they filled it up in the bed of the stream. I believe they put the tunnel on the side so as to divert the stream through the channel; in this place you could put a dam there, improve the stream from there down and take out a drive of from fifteen million to twenty million feet during the spring freshets; at any time you have such a body of water behind you, you can drive it any time you have a mind to.

When I was there they were shooting rocks into it right and left, some of them half as big as a box-car.

I examined the stream with a view as to whether it could be made drivable or not. I seen it was composed mostly of round rocks, the original bed of the stream, what we call "nigger-heads," rounded by the action of the water or by erosion and these rocks were resting on the sand bars. The railroad company, down at the mouth of Kelly Creek where it enters the East Fork of the North Fork, pulled out a lot of these rocks and got gravel for the concrete work at Kelly bridge.

(Testimony of Daniel Francis Seery.)

I was able to discern the difference between the rock that was in the stream formerly and since the construction of the right of way—by their jagged appearance and freshness; those rocks that were in the stream any length of time were rounded off by contact with the water and it is colored.

My examination was from the "loop" down to Arnold's camp, 18 miles. I didn't particularize, but I made a sort of an estimate about how much it would cost to make the stream drivable; I took the whole thing in blocks—this estimate that I made was what it would cost to take out the rocks that the railroad company put in there. I figured that it would cost about $300.00 worth of dynamite and about 16 men working for 150 days. Teamsters at that time were getting from $6.00 to $7.00 per day; the men, including board of all, would be about $3.00 per day, making a total cost in the neighborhood of $10,000.00. That would be a very rough [245] estimate; I can safely say that the obstructions placed by the railroad company in the stream could be taken out for that much. Part of the stream would then be in good navigable condition; the East Fork of the North Fork would, but down below from Clear Creek up there would have to be a considerable improvement made yet. From the East Fork down the stream the obstructions would be very slight. At present there is no obstructions there that would amount to much, or prevent the driving of the stream except those rocks that have been shot down the mountain side from the railroad work.

(Testimony of Daniel Francis Seery.)

Cross-examination by Mr. DUDLEY.

Hardly any stream in its natural condition without any improvements would be drivable for logs. I never saw a stream, even the Mississippi River, would have to be improved before you could drive logs in it.

In this estimate that I have made of the value of those seedlings, I have based that on what my estimate would be on the cost of reseeding the ground at that time. The seedlings themselves have no market value; not commercially.

These maps have had some additional memoranda placed on them since they were prepared and certified by Mr. Baker. All this memoranda on the maps in red ink refers to the seedlings. These have been placed on there since the time that Mr. Baker received his copy of the map, but I fixed up Mr. Day's; I think that I put those values on the seedlings; I won't swear that they were not on there, the copies that I supplied him with, because we discussed the matter fully. But the copies I supplied Mr. Baker did not have those memoranda on. Mr. Baker and I discussed the acreage and he knew that I was taking stock of the seedlings' value, because he helped me count one acre for a sample plat.

After Baker and I had agreed on my maps, we had some conversation by which we agreed on this map. We had the conversation in the office at the Flewelling mill, and afterwards at Taft we talked about it. Mr. Long was not present when we had the conversation [246] at the mill. Mr. Douglas, the superintend-

(Testimony of Daniel Francis Seery.)

ent of the mill, was in the office at the time we talked it over. That was the latter part of September, 1908. At that time I had not placed these memoranda on the maps. The conversation at Taft was a few days after that. Mr. Long was not present at that time. The memoranda I refer to were not placed on the maps at that time,—not until we got to Wallace, but they were right here on this report. At Wallace, in the first part of October or latter part of September, 1908, I met Mr. Baker and Mr. Long. Mr. Skeels was there, if I am not mistaken. I had several interviews with Mr. Long; twice at the hotel and once in the Forest Service office.

Q. Now, at that time, were these memoranda placed upon these papers?

A. Yes, I hadn't delivered any blue-prints to the railroad company up to that, until I had finished them.

Q. Had you placed these memoranda on these particular blue-prints at that time?

A. At that time I placed them; that was the time I put them in there. Mr. Long was present at that time that I put them on the blue-prints, and examined the whole thing. I am not sure whether they were placed on the copies which were furnished Mr. Long or not, but my impression is they were; I am nearly sure they were; that I put on this acerage and the number of seedlings. The principal object was to hurry up and get it finished so that the company could pro rate the amount that each of the sub-contractors would be charged with before they would get

(Testimony of Daniel Francis Seery.)

away out of the country.

I first became familiar with the St. Joe River and the North Fork in September 1908. When I was finished up there I was transferred to Ogden. That was in the latter part of October, just a few weeks after I finished that work there in 1908.

Q. So far as you know none of the obstructions were thrown into [247] the river after the completion of the road up there about the first of January, 1909?

A. I don't know if anything occurred at that time.

Witness excused.

[Testimony of Dorr Skeels, for Complainant (Recalled).]

DORR SKEELS recalled, testified as follows:

(Examination by Mr. DUDLEY.)

I don't think that I fixed the date when I first examined the river and saw these obstructions in there in my previous examination.

I went in there first in the spring of 1907 and remained until the fall of 1908, some time probably towards the last of November. They had the steel laid past the "loop" nearly to the St. Paul Pass tunnel.

These obstructions that I have found there were thrown into the river between the date I first went over there and the date I named as the last time. They were all in there prior to November, 1908.

Witness excused.

[Testimony of W. G. Weigle, for Complainant (Recalled).]

W. G. WEIGLE, recalled, testified as follows:
(Examination by Mr. DUDLEY.)

My first trip into this country along the North Fork, where these obstructions are in the river, was on October 3, 1908. I remained in there three days at that time. I have been there over since, that is, in Wallace and back and forth.

Q. When did they cease throwing the obstructions in, when the last steel was laid?

A. They are doing it some places yet.

Q. Not blasting into the river yet?

A. Yes, they are daylighting cuts. Along about January, 1909, there were obstructions the whole way along the river; you can't see the obstructions now; the water is muddy and colored up. A large portion of the obstructions were thrown in prior to January, 1909, or prior to the spring of 1909. [248]

Q. And prior to June 1st, 1909, it was nearly all in there?

A. I couldn't tell the quantity that was thrown in; in a number of those places they were daylighting cuts and put what they call "coyote" holes, and in one place put in as many as 111 kegs of powder and blew the whole bank down so that large quantities have been put in since that time.

Mr. LINGENFELTER.—Q. Did you say that a large per cent of this was after June, 1909?

A. I said considerable since June, 1909, at the present time they are daylighting cuts. I couldn't tell what per cent was thrown in prior to June, 1909.

(Testimony of Richard H. Rutledge.)

The major part of it was thrown in before the commencement of this suit.

Witness excused.

[Testimony of Richard H. Rutledge, for Complainant (Recalled).]

RICHARD H. RUTLEDGE, recalled, examined by Mr. DUDLEY.

I left that country up there the latter part of January, 1908. I have been back there since. I was not there in 1909. I was simply up there on this recent trip this year. I do not know whether any rock has been thrown into the river since the commencement of this action or not.

Witness excused.

Plaintiff's Exhibit No. 34, which is a compilation of Exhibits 2 to 33, inclusive, will be appended if necessary to complete this statement of the evidence.

Exhibit No. 35 also to be appended, if required.

Depositions.

Depositions of F. I. Rockwell, Wm. W. Morris, E. C. Clifford and F. A. Silcox, taken at Missoula, Montana, before P. J. O'Brien, notary public, May 3, 1911.

[Deposition of F. I. Rockwell, for Complainant.]

F. I. ROCKWELL, witness on behalf of the plaintiff, being duly sworn, testified as follows:

(Examination by Mr. W. C. HENDERSON.)

My name is F. I. Rockwell. My residence is 314 South 6th Street, **[249]** East Missoula, Montana.

(Deposition of F. I. Rockwell.)

I am a forest assistant in the forest service; have been since the first of July, 1908. I spent several years getting training and experience before I entered the service, including in addition to my course in forestry in the University of Minnesota, several years working for private firms in logging camps and sawmill operations, and in estimating timber. In the spring of 1908, I took the civil service examinations for the forest service. Since entering the service I worked in two distinct branches; for about one year I was in the branch of products and my work was making market studies of the lumber industry and the various wood using industries. I was transferred to the branch of Silviculture, and my work since then has been chiefly the examination of timber lands and the study of growth and yield of timber. This experience has extended over the past three years. During the past two years the land upon which I have been working most of the time is along the Coeur d'Alene Forest Reserve in Idaho, on the Kaniksu Forest in the Priest River Valley in Northern Idaho, and on the Lewis & Clark Forest in Montana. The species of timber growing upon these lands were principally white pine, larch or tamarack, Douglas fir, white fir, lodge-pole pine, spruce and a few inferior species.

As a forest officer I have had occasions to make an examination of burned areas along the right of way of the Chicago, Milwaukee & St. Paul Railway Company and in the Coeur d'Alene National Forest in Idaho. That was during the summer and fall of

(Deposition of F. I. Rockwell.)

1909. I was engaged in that work from July until November, 1909. I had for my guidance in making that examination maps and have those maps with me. I secured the map, marked across the face of it "loop fire" from the district forester here. Daniel F. Seery identified this map as a copy of the one used by him in his examination of this same area. This map shows the area which was burned over by fire extending along the Milwaukee right of way. I did examine the entire area shown on this map included in that fire by legal subdivisions. I located the area burned on the ground, compared the area with the map and found that the map corresponded exactly with the area. I **[250]** located the corner between Sections 7 and 18 in T. 46 N., R. 7 E., and between Sections 12 and 13, T. 46 N., R. 6 E., the corner of those four sections, and from this section corner here paced the area, locating its boundaries.

The burned area, located in T. 46 N., R. 7 E. extended over land aggregating 1016 acres in Sections 5, 6, 7, 8, 9, 17 and 18; that covers all the area in this particular burn. These burned areas were pointed out to me by Ranger Kottkey who has charge of that district of the forest.

After I had located the burned areas there, I first made a casual examination to see the extent of the burn and what damage the fire had done, and then made a study of the timber in the vicinity and what species were growing in that locality, what the rate of growth was and how much timber an acre of land would produce.

(Deposition of F. I. Rockwell.)

I selected areas in the adjoining green timber which were growing under exactly the same conditions as were found on the fire areas and carefully surveyed the plats. Then I measured the timber on each area. I calipered the trees at diameter, breast high, to find out how many trees there were of each diameter and of each species, and after having determined this, I selected average trees of the various diameters and cut these down; had the men who were working with me saw them up into logs, measured the diameters of the logs to determine the board feet contained, and in every case determined the age of the trees. From the volume of the average trees, I determined the total volume per acre. The timber in this vicinity grows in comparatively even-age stands; there is not ten or twenty years difference in a merchantable stand, so that after securing the ages of the sample trees we knew just what the age of the stand was. I determined that the age at which the stand became merchantable was one hundred years. At the average age of one hundred years, the average diameter of [251] the white pine was a little over twelve inches and red fir and larch slightly larger than that.

A great deal of young growth had been destroyed in Section 5, but I did not consider it of any value.

On SW. ¼ SE. ¼, Section 6 there were 8 acres of fifteen year old seedlings, forty per cent white pine, twenty per cent lodge-pole pine, twenty per cent white fir, ten per cent red fir and ten per cent larch. The stand was about seventy-five per cent of a good

(Deposition of F. I. Rockwell.)

stand. The value of the immature growth on that area was $121.98.

Q. Upon what basis did you determine this value?

A. I determined that the area was seventy-five per cent fully stocked and I had found from my examination of adjoining areas that fully stocked stands of that same kind of timber at one hundred years produced a certain amount of timber, which would have a corresponding value at the stumpage rate of $4.00 per thousand. This would be the value of that young growth at maturity. By maturity I mean when the stand became merchantable, at one hundred years of age. The stand, however, was destroyed at fifteen years of age so for eighty-five years the Government would not be required to care for that area to protect it; that is, inasmuch as the stand was destroyed the Government was not required to protect it for the remaining eighty-five years. If it had stood, it would have had to in order to secure that value at maturity. I desired to ascertain the value of the present stand at fifteen years of age, so I subtracted the cost of caring for the stand for eighty-five years from the value which could have been received for the timber at maturity—the amount per year per acre which would have been necessary to expend in the care of that area if it had not been destroyed by fire would have been three cents per acre. That rate of cost is slightly greater than the amount the Government is now paying for the care and protection of its timber. After determining what the value of the timber would be at

maturity minus the cost of caring for the timber for the remaining time which the timber would have to stand **[252]** in order to mature, the amount thus obtained was discounted to the present time by compound interest tables at three per cent.

On that subdivision there were seven acres of pure lodge-pole pine of the same age, fifteen years. The value of that timber was $61.67.

There were ten acres of immature timber ninety years of age, thirty per cent white pine, fifty per cent Douglas fir fifteen per cent white fir, and five per cent western larch. I determined that its value was $576.35.

I considered that the most practicable means which might be used in restoring this legal subdivision to its condition before the fire occurred to be planting. The cost would be $15.00 per acre for re-planting the stand with the same amount of young trees as were there before the fire. By that I mean a sufficient number of transplants to obtain an equally good stand. Taking the eight acres upon which the stand had an average of fifteen years, the total cost would be $143.76 for re-planting that area with the species that had been destroyed and caring for the growth until it reached the age at which it was destroyed, and on the area of ten acres on which the average was ninety years, the total cost to the Government of re-planting that area and caring for it until it reached the age of ninety years, would be $1,139.00. Since part of this timber had been merchantable, however, the value of the merchantable part, $400.00,

(Deposition of F. I. Rockwell.)

was subtracted from the total to get the value of the young growth alone, or $739.00.

Since I have been in the forest service, I have continuously observed the cost of planting and determining the amount that should be expended annually in care of young trees. I have compiled tables showing the acreage and stand of the young growth on each legal subdivision within this particular fire area and also showing the result of my computations which I have previously outlined as the value of the young growth on each legal subdivision **[253]** arrived at in the manner I have described.

NOTE.—Papers exhibited to witness and by him identified as the tables made by him.

In the preparation of these sheets I used the method first described.

NOTE.—Four sheets attached together, marked "Government Exhibit 1A for Identification."

Referring to the first page of Government Exhibit 1A for Identification, column 1 shows the legal description of the area to which the figures refer. column 2 shows the subdivision of the section. Column 3, the condition of this young stand which was found on the area designated in columns 1 and 2, before the fire or at the time of the fire. Column 4 shows the age which we found the immature timber which was destroyed to have. Column 5 shows the area in acres to which the figures refer. The area in acres which was burned. Column 6 shows the percentage of each species of young trees destroyed. Column 7 shows the percentage of area which was

(Deposition of F. I. Rockwell.)

completely stocked with timber—with young timber. Column 8 shows the group of data which we used to determine the yield of the area at maturity. That was the data prepared by myself from the measurements taken in the sample areas in the vicinity of the fires.

The legend at the end of the tables explains the abbreviations. Lodge-pole pine is a slower growing species than the others and therefore the application of the lodge-pole pine table to this area is conservative on our part. The larger per cent of the species was lodge-pole pine and for that reason I did not think it safe to use a table which shows a more rapid growth. The same explanation would in every case apply to the tables where different species are shown in Column 6, from those which are shown in Column 8.

Column 9 shows the yield of each area in thousand feet board measure which each area would produce at maturity and its corresponding value at $4.00 per thousand feet. **[254]**

Column 10 shows the value of this mature stand minus the cost of caring for the stand from the age at which it was destroyed to maturity, discounted, to the age at which the young stand was when destroyed.

Column 11 shows the amount of merchantable timber which each young stand contained at the time it was destroyed by fire, and its value computed at $4 per thousand feet. The values shown in this column were deducted from the values shown in

(Deposition of F. I. Rockwell.)

Column 10, in order to secure the value of the immature stand which was not yet merchantable. These figures are shown in Column 12.

Column 13 shows the amount of each species of merchantable mature timber as shown in Seery's report, and its value at $4 per thousand.

Column 14 shows the total value of the unmerchantable young growth on the entire burn.

Column 15 shows the grand total value of the merchantable timber, both of the merchantable part of the young stand and the mature merchantable timber, as determined from Seery's estimate, figuring at $4 per thousand feet.

The figures shown in Column 11 correctly represent the result of my own estimate of the amount of the merchantable portion of the timber that was destroyed on this area.

NOTE.—Government Exhibit 1A for Identification offered in evidence, for the purpose of showing the amount of immature timber which the witness found on each legal subdivision within this burned area, the species of this timber, its average age, its acreage and its value as estimated by the witness.

Mr. DUDLEY.—We object to the exhibit in so far as it purports to show values, for the reason that they are based upon an incorrect method of arriving at the value of the timber destroyed, and for the further reason that the qualification of the witness to testify as to the value has not been shown.

WITNESS.—I have prepared tables showing the stand of young growth destroyed on this particular

burned area, together with the total cost to the Government of restoring the same areas to their **[255]** condition before the fire occurred.

NOTE.—Three sheets fastened together, marked "Government's Exhibit 2A for Identification."

Government's Exhibit 2A for Identification shows the various steps in determining the cost of restoring the young growth to its condition before the fire. Column 1 shows the township, range and section to which the figures refer. Column 2 shows the subdivision of the section. Column 3 shows the condition of the young stand at the time of the fire. Column 4 shows the average age of the young trees destroyed. Column 5 shows the area burned in acres, to which the figures refer. Column 6 shows the species of young trees destroyed, by percentage. Column 7 shows the percentage of the area which was completely stocked with timber. Column 8 shows the actual number of acres of each area which would have to be planted to restore the stand to the same percentage of stocking as existed at the time of the fire. Column 9 shows the total cost of restoring the young growth including the cost of protection and interest on the original cost of planting up to the age at which the young timber was when destroyed, based on the cost of $15 per acre for planting and 3 per cent compound interest, and at an annual per acre cost for protection of 3 cents. Column 10 shows the amount of merchantable timber which existed in the young stand as shown by Mr. Seery's report which I checked over on the ground

(Deposition of F. I. Rockwell.)

and found to be correct, valued at $4 per thousand feet. Column 11 shows the value of the immature stand after subtracting from the total cost of restoring the stand, the value of the merchantable part, which is included with the merchantable timber destroyed. Column 12 is the mature merchantable timber shown on Seery's report valued at $4 a thousand. Column 13 shows the total net value of the young growth on the entire burn after subtracting the merchantable part of the young growth. Column 14 shows the total value of merchantable timber, including both the merchantable part of the young stand and the mature merchantable timber. **[256]**

NOTE.—Goverment's Exhibit 2A for Identification offered in evidence "for the purpose of showing the amount of immature timber destroyed on each legal subdivision, its average age, the area burned over in acres, the species of timber destroyed and the cost of replanting the area with the same species, and caring for it until the trees reached the age of the stand which was destroyed."

Mr. DUDLEY.—We object to the introduction of the Exhibit, for the reasons that, so far as it shows the quantities of timber in the burned areas it is a duplicate of "Government's Exhibit IA," and in so far as it purports to show the cost of re-stocking, and the value of the timber arrived at in that manner, it is immaterial, irrelevant and incompetent, that not being a proper method to get at the market value of the young timber destroyed; and upon the further

ground that the qualifications of the witness to testify as to the cost have not been established.

In addition to the "loop fire" I examined other burned areas along the right of way of the Chicago, Milwaukee & St. Paul Railway Company, using the maps before referred to, which show the other areas as well as those already mentioned. Some of those other areas were pointed out to me on the ground by Mr. Kottkey.

NOTE.—Two sheets fastened together, marked "Government's Exhibit 3A for Identification."

Government's Exhibit 3A for Identification embraces a list of the burned areas found along the right of way of the Chicago, Milwaukee & St. Paul Railway on the Coeur d'Alene Forest, Idaho. Columns 1 and 2 correctly set forth the location of the burned areas that I examined during the summer and fall of 1908, and are embraced in the maps to which I referred.

The columns refer to the same data that is embraced in the "loop fire" area except that here we have all the individual fires other than the "loop fire" area covered in these two sheets, and the totals for all of the smaller fires summed up together at the end. The values of the young growth when destroyed, as described [257] in the testimony on "Government's Exhibit 1A." The arrangement of data on "Government's Exhibit 3A for identification" is identical with that on "Government's Exhibit 1A." The figures in Column 13, which purport to show the amount of merchantable mature timber,

(Deposition of F. I. Rockwell.)

are not based upon my own examination, but are copies from Mr. Seery's report.

NOTE.—"Government's Exhibit 3A for Identification" offered in evidence "for the purpose of showing the location and extent of the burned areas examined by the witness during the summer and fall of 1909 along the right of way of the Chicago, Milwaukee & St. Paul Railway Co., of Idaho, the character and condition of the stands of immature timber found to have been destroyed on these areas, the average age of the young trees destroyed, with the species of timber, the percentage of the areas which were fully covered with young growth and the value of this young growth at the time it was destroyed by fire."

Mr. DUDLEY.—We make the same objection to this Exhibit that we did to "Government's Exhibit 1A."

During the period of my examination of these fires, in addition to the fire known as the "loop fire," I did determine what it would cost to restore the area to the condition before the fire, by the most practical method of re-stocking. I have embodied those figures on a table which I have here with me.

NOTE.—Two sheets marked "Government's Exhibit 4A for Identification."

This exhibit shows the cost of restoring the young growth on various burned areas other than the "loop fire" area along the Chicago, Milwaukee & St. Paul right of way in the Coeur d'Alene National Forest, Idaho. In its arrangement it is identical in all re-

(Deposition of F. I. Rockwell.)

spects with the "Government's Exhibit 2A," and I used the same figures with reference to the cost of re-planting and care and the rate of interest.

NOTE.—Government's Exhibit 4A for Identification offered in evidence, for the purpose of showing the cost of restoring the [258] burned areas shown by the Government's Exhibit 3A.

Mr. DUDLEY.—We make the same objection to the admission of this exhibit that we did to the admission of Government's Exhibit 2A, and we make the following objection to the admission of all these exhibits: That they are not competent, under the issues in this case, for the purpose of giving any equitable relief the remedy for the injury, if any injury there was, being at law, and the court of equity having no jurisdiction. [259]

Cross-examination by Mr. DUDLEY.

On the S.½ N.½ SE.¼ of Section 9, in T. 46 N., R. 7 E., 46 acres were burned over. That description applied to the location of the burned area and I did not mean to state that it did not include part of the N.½ of the NW.¼ of Section 9. I gave a separate description of S.½ of NW.¼ as covering 80 acres. This description of the S.½ of the N.½ of the NW.¼ of Section 9 is intended to include 6 acres that is in the N.½ of the N.½ of the NW.¼.

Government's Exhibits 1A and 2A refer to the same areas and the columns 1 to 7 inclusive are just the same in both exhibits and the same is true of columns 1 to 6, inclusive, in Exhibits 3A and 4A.

"The percentage of area fully stocked," in Column

(Deposition of F. I. Rockwell.)

7, means that the timber which was found on that area occupied the percentage of the area shown in Column 7.

Q. Take this second item in the exhibit—"Fifty per cent of area fully stocked"—Now was there fifty per cent of that area that had no stock on it?

A. There was fifty per cent of the area which supported a growth of trees, fifty per cent of the area which did not. By "fully stocked stand" I mean that all the area is occupied by trees, and by "50% stocked," I mean that only half of the area is occupied; that the trees are only half as thick, half as numerous, as where the area is fully stocked—that is, that there are only one-half the number of trees there that would be if it was what I would deem fully stocked. I determined the number of trees which should have been there if it was fully stocked by examining the areas similiarly situated in neighboring timber adjoining the areas examined, and taking a large number of plats and averaging the number of trees per acre which they contained.

These fires were burned the year prior to my examination. The timber which had been on the areas at the time of the fire was [260] still there although killed by the fire.

My estimates did not show the number of trees of any kind or of all kinds which would have been upon the land if it had been fully stocked. They did not show the number of trees which were upon the land at the time of the fire, because in young timber it is not the exact number of trees which determines the degree of stocking as much as it is the distribution of

the trees over the ground. For that reason I determined the comparative distribution of the trees over the area, and when I found that the trees were well distributed over all the area so as to utilize all the ground I considered it fully stocked.

In Exhibits 2A and 4A I based my calculations as to the cost of restocking upon the theory of planting in the beginning a greater number of trees than I would expect to come to maturity, so as to make allowance for those which would be killed prior to coming to maturity. It is a fact that there is a greater or less percentage of trees lost from various causes long before they come to maturity. And that possibility of loss extends over the entire period until they reach maturity.

In Exhibits 1A and 3A, I did make allowance for the possibility of loss of the trees between the ages that I found them to be as shown on the exhibits and the time when they would come to maturity. I used as a basis for determining whether the stand was completely stocked practically the same figures which we would consider the proper number to plant. I have no column showing that discount on these exhibits. I have prepared for my own information the tables showing the number of trees per acre which a fully stocked stand has at various ages.

Q. Taking this first item, in determining the value of the young trees in Section 5, have you not, in carrying out your valuation of $4 per thousand, based that on the entire number of trees— one hundred per cent of fully stocked stands? [261]

(Deposition of F. I. Rockwell.)

A. In this case the area was peculiar. There was a large amount of mature timber and a very heavy stand of young growth of all ages, and it would be practically impossible to take out the mature timber without destroying the young growth, so that if we expected to market the mature timber we would have to destroy the young growth; therefore I did not consider the young growth on that area of any value, and the $440 shown in Column 13 is merely the value of the mature timber which Mr. Seery found on that area.

To get the value of $536.75 for the immature timber on the SW.¼ of SE.¼ of Section 6, I did not take the full quantity of immature timber which I found had been standing at the time of the fire,—I took only the immature timber on that subdivision which was unmerchantable. I did make a deduction for the probable loss of the immature timber between the time of its destruction and the time when it would have become mature if it had not been destroyed by this fire. It is not shown in the column on this, that would be represented by a decrease in the number of trees per acre, which would occur during the time between the age of this timber when destroyed and the age when mature.

The way I secured those figures is this: Upon examination of that area—which was 90 years old—I found that fifty per cent of it was fully stocked and that areas which were fifty per cent stocked with the same kind of timber at maturity yielded the amount of timber on ten acres which is shown here in column

(Deposition of F. I. Rockwell.)

IX. At maturity a stand of mixed white pine and Douglas fir, fifty per cent stocked, would yeild 327,500 feet, which at $4 per thousand would be worth $1,310. Then I subtracted the total cost of protecting and caring for the stand for ten years and discounted the remaining value at the age when destroyed. While a stand that is 50 per cent stocked at 90 years will undoubtedly lose a certain per cent of its standing trees during the ten years, which must pass before it will be merchantable, yet that loss is inevitable, and if the stand was fifty per cent stocked at 90 years, it would [262] be 50 per cent stocked at 100 years, although part of the trees would have died. In other words, I have assumed that there would be the same percentage of the land stocked at maturity that there was at the time of the fire.

Q. All of that country was burned over with fires last year—1910—was it not?

A. I understand so; I have not been there.

I think last year was an exceptional year. If more money was spent on forest protection, perhaps no such fires would occur, and while such fires as occurred last year may occur once in a hundred years, or once in two hundred years, the fact that we have any timber at all in that country would show that the destruction of timber from fire is actually comparatively small.

It is a fact that in 1888, fires in this country were practically as destructive as they were last year, probably a great deal more so. It is not a fact that with the utmost care fires of greater or less destruct-

(Deposition of F. I. Rockwell.)

iveness would start and rage in these forests. I think that the experience of the service has pretty well demonstrated that more protection is possible and practical. From my experience I should say that the elements of destructiveness by fire is from half to one per cent.

Q. You have made no allowance in your estimate here for insurance against destruction—whether by fire or windfalls or other causes, have you?

A. We have made an allowance of three cents per acre to be spent annually for protection.

Q. But no allowance for loss which will occur notwithstanding the best protection that you can give?

A. This 3 cents an acre, I believe will efficiently protect a forest, so that it will be practically safe from fire during its period of growth.

Snowslides will not occur where ground is sufficiently well covered with forest growth to hold the snow in. [263] Windfalls will occur somewhat, but the trees which fall in the heavy or dense forest through wind are those which would fall in the gradual thinning of the forest.

I have seen stretches of country where practically all the trees have been blown down by some tornado, but not in the Coeur d'Alene forest. I have been in Idaho two years. I have not seen any areas of timber in Idaho that were overthrown by the wind. All my computations of value are based on a valuation of $4 per thousand at maturity—and I placed that valuation regardless of the kind of timber. There is a material difference between the value of white

pine stumpage and of yellow pine. Also between yellow pine and the firs—but while one species is worth a great deal more than the other at the present time the experience of lumbering industry in other parts of the country would show that the same relative difference in stumpage values may not hold when this timber becomes mature and that $4 will be as safe an average for all the species as any figure that we could select.

Q. In other words, you took a sleeve out of Elisha's mantel and made a prophesy as to what the value would be some 75 or 80 or 90 years hence as the basis of your figures?

A. Not necessarily. The stumpage value of these species in other localities is as much as $4 to-day, and inasmuch as the price of timber is advancing, there is no reason why we should not expect fully as good prices for any species fifty or more years hence as that same species is bringing in some localities to-day. The value depends very largely upon the location. I was not familiar with the market value of timber tributary to the Coeur d'Alene Lake in 1907 and 1908.

In figuring the cost of restocking, I included interest compounded annually at three per cent.

Redirect Examination by Mr. HENDERSON.

In areas which were not fully stocked at the time of the fire, if the timber had not been destroyed by fire, I am convinced that [264] the stand per acre at maturity would have been much better than that which existed at that time, because as soon as the

(Deposition of F. I. Rockwell.)

trees began to bear seed—which is at about 20 years of age, they would have seeded up the intervening places.

Recross-examination by Mr. DUDLEY.

In making my estimates as to what I concluded would be upon a given area in the burn when the trees would have reached maturity, if they had not been destroyed, I based that estimate upon actual stands of mature timber found on similar areas in the immediate vicinity. In every case, in producing those stands nature has done a great deal of thinning. The suppressed trees were on the ground in every case I think.

I do not think that it is more probable that the timber if it had not been burned in 1907 and 1908 would have been burned in 1909, than that it would have come to maturity, because from the direction in which the fires of 1910 burned from the strong west wind which was prevailing that day—the fire, with regard to the "loop fire" particularly, would have struck the least timbered portion of the area first, and inasmuch as the degree of stocking was quite low and the trees were smaller, the fire might have avoided a considerable part of the young growth, and so the young timber would have escaped. The 1910 fires burned practically all the dead standing timber. In many cases there were pockets which escaped.

Redirect Examination by Mr. HENDERSON.

In making these examinations which I described Mr. Morris assisted me.

(Deposition of F. I. Rockwell.)

NOTE.—Mr. Dudley moved to strike out all of Mr. Rockwell's testimony, for the reasons assigned and various objections interposed and for the further reason that it appears that in his estimates of the cost he has allowed an unwarrantable rate of interest in his estimates based on the value of timber at maturity, [265] and there is no definite allowance for insurance or the probability that the timber would been destroyed from other causes, and also upon the ground that the testimony is not competent as furnishing any basis for equitable relief.

[Deposition of Wm. W. Morris, for Complainant.]

WM. W. MORRIS, a witness on behalf of the plaintiff, after being duly sworn, testified as follows: (Examination in chief by Mr. HENDERSON.)

My name is Wm. W. Morris. My residence is Wallace, Idaho. I am forest assistant. I have been employed in the forest service 2 years the first of next July. Prior to entering the forest service I have graduated from the forest school, University of Michigan, 1909, receiving a Master's degree in forestry.

Since being in the forest service I have been employed mainly on timber sales in the Coeur d'Alene National Forest. I began my work in the Coeur d'Alene National Forest in July, 1909. I did assist Mr. Rockwell during the summer and fall of 1909 in connection with his examination of the burned areas he has described. I assisted him mainly in the measurement of the sample areas of timber adjoining the timber near the burns.

(Deposition of Wm. W. Morris.)

NOTE.—Subject to the same objections which have already been interposed to Mr. Rockwell's testimony; it is admitted by the defendant that the witness Morris, would, if examined at length, testify to the same facts already covered in Mr. Rockwell's testimony relating to the examination of the sample areas described and the computation of the quantities of timber found upon these sample areas, as well as the ages of the trees and their diameters.

I did pass over a portion of these burned areas. I cannot say that I have seen them all. I have seen most of them.

I have been employed on the Coeur d'Alene Forest for nearly two years and it has mainly been on timber sale work. In July and August, 1909, I was out with lumberman, George A. Cott, making an estimate of various watersheds on the St. Joe River. [266] After that I have been employed steadily in making estimates, maps and reports on various areas applied for by timber purchasers.

I am familiar with the species of timber which were on these burned areas described by Mr. Rockwell and with the location of the nearest market for timber from this burned area at the present time. In my judgment the present value of green timber in this locality is $5 per thousand feet.

I know of a sale of one area similarly situated upon which the same species of timber was standing. This timber was sold at $4.00. That was a flat rate, I believe.

Owing to the fact that the stand of timber along

(Deposition of Wm. W. Morris.)

the St. Paul R. R. was the finest stand of timber on the Coeur d'Alene forest that it was, at a very conservative estimate, over sixty per cent white pine, and that in making a price of $4 per thousand feet we have thereby been very liberal to the railroad, I base my judgment that similar species of timber on these particular areas, if green, would be worth $5 per thousand.

Cross-examination by Mr. DUDLEY.

The sale that I have testified to at $4 a thousand was made during the summer of 1910. I did not make the sale.

Q. Were you personally present when it was made?

A. I looked over the area. That contract was in writing.

Up to the present time the market for all of this timber is the Coeur d'Alene Lake. There are two other towns along the railroad and along the St. Joe River—St. Joe and St. Maries—where they could take a great quantity of timber where sawmills are located. The market value of timber there is governed practically by the price of logs in the Coeur d'Alene. I do not know what the price of logs was in 1907 and 1908. I do know in 1909.

The name of the purchaser in this sale which I was speaking of is Edward F. McMann.

[Deposition of E. C. Clifford, for Complainant.]

E. C. CLIFFORD, a witness in behalf of the plaintiff, after [267] being duly sworn, testified as follows:

(Examination by Mr. HENDERSON.)

My name is E. C. Clifford; residence, Missoula, Montana. My occupation is forest assistant, forest service. I have been in the forest service since July, 1904, with the exception of about six months at the University of Michigan, where I was taking a post-graduate course in forestry. In the winter of 1898 and 1899 I was engaged in scaling spruce in the White Mountains and in the fall of '99 entered the University of Maine and took an undergraduate course in forestry—four years. Since I have been in the forest service I have worked principally in forest nursery and field planting work. Since last July I have been doing planting work and general work on the forest—demonstration and other duties. My duties consisted in sowing seed, raising seedlings, in their care and protection, taking the seedlings up, shipping them to different points, planting them in the field, and sowing seed of forest trees in the field.

Since I have been in this district the species of timber I have been concerned in planting is western yellow pine, western white pine, Douglas fir, Engelmann spruce, larch, eastern white pine and a few others of a less important species.

I have been on the Coeur d'Alene National Forest. I have been upon a portion of the area described

by Mr. Rockwell in his testimony—that along Kelly creek. Sec. 7, T. 47 N., R 7 E. is the area I am familiar with. I have passed up and down the railroad right of way along that region from Adair. Adair is about half a mile west of Kelly Creek. While there in the vicinity of these burned districts described by Mr. Rockwell I did notice the topography of the country and the soil conditions.

The actual work of planting an area of this kind, consisting of setting the seedlings in the ground, could not be done for less than $10 an acre. The stock necessary for planting it laid down [268] on the ground would be worth $5 a thousand, making $15 an acre, planted up. Figuring on the loss and the character of the ground I would not plant less than 1200 to the acre, with a space of 6′x6′. I have had experience in caring for the seedlings after they had been planted since I have been in the forest service. The required expenditure to properly care for and protect the seedlings after they were planted, on an area of this kind, subject to frequent damage from fires, near the railroad, of five cents an acre per year would be conservative.

Cross-examination by Mr. DUDLEY.

In speaking of the danger from the railroad I assume the fuel used to be oil. There would be increased danger in case of coal.

[Deposition of F. A. Silcox, for Complainant.]

F. A. SILCOX, a witness in behalf of the plaintiff, after being duly sworn, testified as follows:

(Examination by Mr. HENDERSON.)

My full name is Ferdinand Augustus Silcox. I am Associate District Forester, District No. 1, forest service; my residence is Missoula. I have been in the forest service since July 1, 1905, and in this district permanently since December, 1908. I have been in the district organization approximately two years as Associate District Forester. I was in the district as inspector since 1907. My duties are practically those of the district forester, which would be general supervision of the entire work in the district including timber sales, and fire protection. My district includes the Coeur d'Alene National Forest. In this district in connection with its timber sale work and fire protection, the Government is spending for all work about $742,000, which makes on twenty-nine million acres approximately 2½ cents per acre. For administration of timber sales it would be approximately one cent an acre and about one-half a cent an acre for fire protection proper.

I figured that for three cents an acre we can put a man on fire patrol, who can take care of the timber sale work on the [269] present basis with a reasonable increase in sales and in addition provide for one man for fire patrol to every fifteen thousand—thirty thousand acres, depending on the fire danger. This I figured would be adequate.

Of course, fire danger cannot be entirely eliminated,

but it will be reduced to a minimum, so much so that we feel that it would be fairly safe. A man on that basis could reach a fire within an hour or two. On a basis of one man for one-half township, he would be within approximately three miles of any fire started.

NOTE.—Mr. Dudley moved to strike out this testimony on the ground that it was incompetent, immaterial and irrelevant under the issues in this case.

[Deposition of George R. Peck, for Defendant.]

Deposition of GEORGE R. PECK, a witness on behalf of the defendant, taken before F. B. Dickinson, a notary public in and for the County of Cook, in the State of Illinois.

GEORGE R. PECK, a witness in behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination by Mr. DYNES.

My name is George R. Peck. During the years 1906 and 1907 I was general counsel of the Chicago Milwaukee & St. Paul Railway Company. During those years I acted for a corporation of that name of the State of Montana and for a corporation of that name of the State of Idaho and for a corporation of that name of the State of Washington. I had charge of and conducted the negotiations on behalf of those companies with the Department of the Interior and of the Forest Service of the Department of Agriculture in Washington in respect to the right of way of those companies across the lands of the Government. I acted for the Montana company in respect

(Deposition of George R. Peck.)

to its application for a right of way through what is known as the Helena Forest Reserve in the State of Montana, in the capacity of agent and attorney. I cannot state definitely the time, but it was along about the year 1907. With respect to a stipulation or agreement entered into by the Montana company with the United [270] States Department of Agriculture on the 18th day of January, 1907, which is referred to as Exhibit "D" in the bill of complaint in this suit, I recall the facts of the stipulation, but I do not recall the date. I did have charge for the Montana company of negotiations with the forest service leading up to the execution of that stipulation. Subsequent to that time I acted for the Idaho company with respect to its application for a right of way through what is known as the Coeur d'Alene reserve in the State of Idaho, and possibly others have something to do with it, but I was certainly connected with it. The officers of the Idaho company I conferred and acted with in respect to the matter of said right of way were Mr. H. H. Field, General Counsel of that company, and I think H. R. Williams, President, both located in Seattle. I did have immediate charge of negotiations with the forest service in Washington in respect to the right of way of the Idaho company through said proposed reserve.

NOTE.—There was read to the witness a copy of Exhibit "C" to the bill of complaint in this case, purporting to be an agreement on behalf of the Chicago, Milwaukee & St. Paul Railway Company of

(Deposition of George R. Peck.)

Idaho, in respect to the proposed construction of its railroad through the Coeur d'Alene National Forest. I recall the agreement and the circumstances, generally speaking, connected with it; as much as could be expected, I think. I either drew or had to with the drawing of the stipulation which the agreement as read refers to executed January 18, 1907, in respect to the railroad's right of way within the Helena National Forest.

It was my understanding that prior to the signing of the stipulation, Exhibit "C," on October 23, 1906, the Idaho company had filed in the local land office at Coeur d'Alene, Idaho, a map of its right of way through the land afterwards included in the Coeur d'Alene Forest Reserve. My negotiations with the forest [271] service in respect to the right of way were conducted with reference to the application of the Idaho company for such right of way as evidenced by the map referred to.

At the time of signing the agreement "C" I did not know that the Coeur d'Alene Forest Reserve had not been created by proclamation of the President at the time that the map was filed.

"NOTE.—Mr. Lingenfelter objected to the question as to whether at the time he signed the agreement, Exhibit 'C,' he knew that the Coeur d'Alene Forest Reserve had not been created by the proclamation of the President, at the time the map was filed, for the reason that the witness, being general counsel for the company, and the defendant company, are charged with knowledge of proclamations

(Deposition of George R. Peck.)

issued by the President, and it is incompetent and immaterial."

I was not the general counsel for the Idaho company and I did not know until some time afterwards that I had been put down as general counsel of the Idaho company. I did not see it, and did not notice it. I was general counsel of the parent company, the main company. It was an oversight, an inadvertence, and undoubtedly was written by some of the clerks or people connected with the forest service who did not understand the situation. Certainly the title was not written on by myself.

After the signing of Exhibit "C" I was advised as to the fact that at the time the map was filed the forest reserve had not been created by a proclamation of the President. I received such information, I think, from Mr. Field, who was general counsel for the Idaho company.

"NOTE.—Mr. Lingenfelter objected to the question from whom did he receive such information, on the ground that it was immaterial and incompetent for any purpose in this case." See page 8 of Mr. Peck's deposition.

I was in Washington on business with the forest service [272] in connection with the application of the Idaho Company for a right of way. I cannot state the date. Mr. H. H. Field, general counsel of the Idaho Company, was with me. At that time Mr. Field and I did have negotiations with the forest reserve in respect to a right of way through the proposed reserve and with respect to a right of way

(Deposition of George R. Peck.)

for the Washington Company through what was then known as the Yakima Forest Reserve in the State of Washington. Whether they were contemporaneous, I cannot state, but we had the subject up. I think that Mr. Field was present representing the Washington Company as well as the Idaho Company in these negotiations. I think the negotiations in respect to the reservations were had with the same officials in the forest [273] service and were carried on at the same time. I think we had these negotiations with Mr. Price and Mr. Cox probably. Whoever we had them with, they were the accredited representatives and employees of the forest service. I had had many negotiations with them on various questions and it would be very difficult for me to name just who I talked with. Whoever it was, was the proper officer or agent of the forest service. Judge Woodruff, I think, at that time had become Assistant Attorney General. I knew him very well when he was with the forest service.

Q. State whether or not in respect to the applications of the Idaho Company, and the Washington Company, the fact was brought up and discussed that, at the time of the filing of their respective maps, the respective reservations had not been created by proclamation of the President, but rested only under temporary withdrawal by the Commissioner of the General Land Office.

Mr. LINGENFELTER.—That is objected to for the reason that the proclamations show for themselves the date they were issued and any conversation

(Deposition of George R. Peck.)

that the witness had at that time with reference thereto would be incompetent and immaterial. It is furthermore objected to for the reason that the parties present, and the time of the conversation are not stated.

A. Yes, sir.

I have stated the names of the parties present at the time of the conversations as fully as I can recall,—I cannot state offhand who may or may not have been present at any given conversation. We had conversations with Mr. Woodruff separate from the others. Mr. Woodruff had gone to the Interior Department as Assistant Attorney General, and it was suggested, perhaps by myself, that we should go over and talk with him on this subject. Mr. Field and I went and had a conversation with Mr. Woodruff. The fact of my having signed this stipulation or agreement, Exhibit "C," was discussed.

Q. State whether or not during the negotiations with respect to the Coeur d'Alene Reservation you informed the officials [274] of the Forest Service that at the time you signed the stipulation or agreement, Exhibit "C," which I have read to you, you did not know that the Reserve had not been created by proclamation prior to the time when the Idaho Company had filed its map of location?

Mr. LINGENFELTER.—Objected to for the reason that both the witness and the defendant are charged with knowledge of the date of the proclamation. A. I think I so stated.

Mr. DYNES.—Q. State whether or not you also

(Deposition of George R. Peck.)
stated to the officials at that time and place, that at the time you signed the stipulation or agreement now called Exhibit "C," you understood as a fact that the Coeur d'Alene Reservation had been established by proclamation of the President, and was in the same situation as the Helena Reservation at the time that the Montana Company filed its map.

Mr. LINGENFELTER.—Objected to for the reason that any statement which he made would be immaterial, as the agreement speaks for itself, and also the proclamation, and the witness is charged with having knowledge.

A. I so stated.

Mr. DYNES.—Q. What, if anything, was said to you by the Forest officials in respect to your having signed the agreement, Exhibit "C," under the circumstances above referred to?

Mr. LINGENFELTER.—Objected to for the reason that any conversation the witness may have had with the Forestry officials would be incompetent and immaterial, for the reason that the agreements have been reduced to writing and the writings speak for themselves. Further, it is not shown that the official with whom the witness had such conversation, if any, was authorized to modify or correct the agreement marked Exhibit "C."

A. Well, it was stated by Mr. Woodruff, and probably by some others,—but I recollect Mr. Woodruff,—Mr. Woodruff stated that if I signed that stipulation under a misapprehension of the facts, [275] it ought not to be held against me, and they would

(Deposition of George R. Peck.)

not so hold it. I think he went that far; I think it was Mr. Woodruff. I think he said it would not be just, or fair, or equitable. I do not remember the words that he used, but that it would not be fair to attempt to hold it against us."

Referring to the telegram and letter, Exhibits "E" and "F," attached to the bill of complaint, I had knowledge that he either had sent, or would send a communication to Mr. Rutledge, but I did not know the contents. I do not think I ever saw it, still I may have.

"Q. State whether or not it is a fact that at the time the letter and telegram were sent, you had knowledge that the situation with respect to the Coeur d'Alene Reservation was different from that in respect to the Helena Reservation, or had not such knowledge.

Mr. LINGENFELTER.—The same objection; the witness is charged with knowledge, as is the defendant also.

A. I do not think I had such knowledge; I cannot state whether I then knew it or not, but probably not. I do not remember when I learned the fact. I might have learned it contemporaneously with those and I might not. I cannot tell. I was a very busy personage in those days.

Q. State whether or not at any time, after May 10th or 11th and prior to the instituting of this suit, those officials with whom you had dealings took any other attitude on the subject of the effect to be given

(Deposition of George R. Peck.)

the agreement of May 10th, 1907, than what you have already told.

Mr. LINGENFELTER.—That is objected to for the reason that it is not shown that any of the officials with whom the witness conferred had authority to bind the plaintiff in this case.

A. They did not. At some stage it was suggested that a friendly suit be instituted.

Mr. DYNES.—Q. When the situation arose subsequently, as you have explained, which brought into question the matter of whether the [276] agreement or stipulation signed May 10th, 1907, would be binding or not, it was determined to have a friendly suit, was it? A. It was.

Q. And that led to this present suit?

A. As I understand it, yes, sir.

Q. State whether or not at the time such understanding for a submission to the courts of a friendly suit was reached, you had been advised or informed that the Department would not carry out the assurance previously given you that if the agreement Exhibit "C" had been signed, under a misapprehension of facts on your part, the Idaho Company would not be held to a strict compliance with its provisions.

Mr. LINGENFELTER.—Objected to, as it is not shown that the officials with whom the witness had conferences had any authority to bind the Government, and for the further reason that the documents and papers speak for themselves.

A. No, I had not been so informed."

(Deposition of George R. Peck.)

Cross-examination by Mr. LINGENFELTER.

NOTE.—At this time Mr. Lingenfelter made the following motion:

"Comes now the plaintiff and moves the Court to strike out all the testimony on the part of the witness Peck for the reason that it is incompetent and immaterial and does not tend to prove or disprove any of the issues in this case; for the further reason that the matters testified to by the witness are embodied in written documents and instruments which speak for themselves, and it not having been shown that any of the parties with whom the witness had conferences, had authority to bind the Government to modify or correct any of the instruments described by the witness." [277]

I am 68 years old; have been in the employ of the Chicago, Milwaukee & St. Paul Railway Company about 15 years, I think, as General Counsel from the time of my beginning until January 1, 1911, and then I became Consulting Counsel. I am now Consulting Counsel and perform such duties as may be assigned to me by the President or the Board of Directors. My health is not very good, not very bad. I think my memory has not been impaired, not to amount to anything. I am not conscious of it. I think as a general proposition I am able now to recall dates and persons and times as when I was in the active service of the company; but nobody can remember a long series of dates, and possibly not of facts; however, my memory is good enough.

(Testimony of H. H. Field.)

Testimony for defendant taken pursuant to a stipulation at Spokane, Washington, before E. J. Lake, a notary public, commencing on the 2d day of November, 1911.

[Testimony of H. H. Field, for Defendant.]

H. H. FIELD, a witness for the defendant, after being duly sworn, testified as follows:

(Examination by Mr. DUDLEY.)

My name is H. H. Field. I am General Counsel for the Chicago, Milwaukee & Puget Sound Railway Company. In 1906, 7 and 8, from the time of organization in January 1906, I was General Counsel of the Chicago, Milwaukee & St. Paul Railway Company of Idaho. I was also counsel for the Chicago, Milwaukee & St. Paul Railway Company of Montana in all the business of that company west of Butte, Montana; had charge of the legal business west of Butte.

On the 1st of January, 1909, the railroads of the Chicago-Milwaukee & St. Paul Railway Company of Montana and the Idaho Company were conveyed to the Chicago-Milwaukee & Puget Sound Railway Company, a corporation of Washington, which has been the owner of those roads since that time.

Referring to the negotations between those companies and the government relative to securing a right of way through the [278] Helena Forest Reserve in Montana,—I had nothing to do with the Helena Reserve; I had charge of the applications for right of way in the reservations west of Butte; that was the Lolo Reserve, I think, and also the re-

(Testimony of H. H. Field.)

serve in Idaho, known as the Coeur d'Alene Reserve, and in Washington the principal reserve was what was then called the Yakima Reserve; it is now the Washington Forest on both sides of the Cascade Mountains.

I am and was acquainted with Mr. George R. Peck, of Chicago. Mr. Peck was the general counsel of the Chicago, Milwaukee and St. Paul Railway Company. His connection with the Montana and Idaho Companies was as attorney and agent and counsel; he was not an officer of either of those companies, but he acted for them in matters in Washington particularly.

Referring to Exhibit "C" attached to the complaint in this action,—as nearly as I can recollect, my attention was first called to that in October, 1907, in Washington, some time between the 1st and 15th of October, 1907; I was there at that time with Mr. Peck.

Referring to the testimony of Mr. Peck given in his deposition in this case,—I am the Mr. Field referred to in that testimony. The information which I gave to Mr. Peck was given in Washington in October, 1907, at the time of our trip there. I can't give the exact dates. It was at the time when my attention was first called to the stipulation, that may have been between the 1st and the 20th, I don't remember the exact date.

At that time we had negotiations with the forestry service with reference to the procuring of a right of way through the Coeur d'Alene Reservation; Mr.

(Testimony of H. H. Field.)

Wells, I think, was the law officer at that time; Mr. Price and Mr. Cox were there and I think one other official, I can't recall his name. There were about four people that we conferred with in the forestry department. We also had one conference with Mr. Woodruff, a former official of [279] the Forestry Department who was then attorney or assistant attorney general attached to the Interior Department.

We were discussing in this interview a stipulation to be executed by the Chicago, Milwaukee & St. Paul Railway Company of Washington in respect to the Yakima Reserve or the Wenatchee division of Yakima Forest. We had conferences with respect to that with these Forestry officials and with Mr. Woodruff during the same time the matter of this Coeur d'Alene stipulation was brought up, proposed stipulation; we discussed that because the conditions were similar to those in the Wenatchee forest; it was during those interviews—and they lasted two or three days—that this stipulation was first brought to my notice, and it was at that time that I informed Mr. Peck that at the time the maps were filed of the Idaho Company in what is now the Coeur d'Alene reserve, the proclamations establishing the reserve had not been issued; that is, that the maps had been filed prior to the proclamation and at a time when the lands were under temporary withdrawal. In these conversations when Mr. Wells, Mr. Cox and Mr. Price were present, the matter of Mr. Peck having signed this stipulation was referred to and discussed. It was stated there that Mr. Peck did not know that

(Testimony of H. H. Field.)

at the time the maps were filed the proclamation had not been issued. In answer to that statement some of the officials of the Forestry service stated that if Mr. Peck signed that stipulation under a mistake as to the facts, they would not hold him to it. I am not certain whether Mr. Wells, Mr. Cox or Mr. Price made that statement; it was one of the officials there with whom we negotiated during the two or three days.

NOTE.—Mr. Henderson moved to strike out the preceding testimony as immaterial and because it was not shown that the officials making such statement had authority to modify the contract Exhibit "C."

I think that Mr. Adams was present during some of those negotiations, but I am not certain whether he was there at [280] this time.

Subsequently I had correspondence and also interviews with representatives of the forestry department at Seattle.

From the time we were in Washington in October, 1907, up to the time this suit was brought, there was never any letter or communication or statement brought to my notice at any time by anyone, or any reference to that stipulation, the Peck stipulation, until this suit was brought.

NOTE.—Mr. Henderson objected to the question as to whether since October, 1907, there was any letter or communication or statement brought to the notice of the witness or any reference made to Exhibit "C," upon the ground that the correspondence would be the best evidence of what it contained and because

(Testimony of H. H. Field.)

the testimony was incompetent and immaterial.

After we were in Washington and in the course of a few weeks the proposed stipulation was forwarded to some of the forestry officials, I think Mr. Rutledge, or whoever was in charge of the Coeur d'Alene forest, and that stipulation was sent to me, and from that time on there was considerable correspondence and negotiations principally between Mr. Peck and the Department in Washington, and they did not reach any agreement; I believe the arrangement was made that a friendly suit should be brought to try out the question, and a long time after that, I think it was Mr. Shaw that came to Seattle and talked the matter over with me as to the proposed suit. I think he submitted to me a draft of the bill of complaint, which I considered, and which was changed two or three times before it was filed. I had one or two interviews with Mr. Shaw at Seattle.

Cross-examination by Mr. HENDERSON.

Referring to the negotiations for a right of way across the Coeur d'Alene National Forest in the early stage of the negotiations,—I had charge of the filing of the maps; that was the first step. The negotiations at Washington were conducted by Mr. Peck until October, 1907; he and I were in communication, but he was looking [281] after things in Washington. Dudley & Michener, I think, were attorneys for the company at the time the Idaho proposition came up. Previous to that time Mr. Davis had represented us in Washington, Henry E. Davis. With the exception of Dudley & Michener, Mr. Peck was

(Testimony of H. H. Field.)

the Washington representative for that particular corporation.

I can't tell more definitely who the gentleman was that I believe made the statement that if Mr. Peck was mistaken as to the dates of the proclamation when he signed Exhibit "C," that they would not hold the company responsible for it. There were a number of bright young men there connected with the Forestry Department.

Q. Are you sure that it was not Mr. Woodruff that made that statement in your subsequent conference with him?

A. I only had one conference with Mr. Woodruff; that was in respect to the Wenatchee proposition because Mr. Woodruff had been recently connected with the forestry department as the law officer. Mr. Wells was there at that time and I think it was Mr. Wells' suggestion that we should go over and talk with Mr. Woodruff about the Wenatchee proposition; there was a difference between us as to the rights of the company and we went over there to his office. Mr. Wells went along and one other forestry official. Mr. Peck and myself were present. I can't remember whether this Coeur d'Alene question came up before Mr. Woodruff or not. Mr. Peck was present at the time that the statement was made. Only one occasion that that particular statement was made is all I recollect of, because the statement was made to Mr. Peck. I remember distinctly the officer who stated, he says, "Now, Mr. Peck, if you signed that under a mistake of facts, we will not hold you to

(Testimony of Arthur E. Douglas.)

it,"—that was the language, but I would not undertake to say who that was that said it. My recollection would be that the Coeur d'Alene matter was not taken up until after the Wenatchee matter and do not think we conferred with Judge Woodruff on the Coeur d'Alene matter except as the general subject was discussed.

Witness excused. [282]

[Testimony of Arthur E. Douglas, for Defendant.]

ARTHUR E. DOUGLAS, a witness for the defendant, after being duly sworn, testified as follows:

(Examination by Mr. DUDLEY.)

My full name is Arthur E. Douglas. I am a woodsman for the Blackwell Lumber Co. I have been engaged in the lumber business about sixteen years, the last nine years in Idaho working for the B. R. Lewis Company, the Monarch Timber Company and Blackwell Lumber Company. I have had charge of the logging most of the time; buying timber and cruising. I am quite familiar with the St. Joe country near the west end of the St. Paul pass tunnel down to the head of navigation and with the St. Maries country. The St. Maries River is tributary to the St. Joe.

Nine years ago this fall I started work on the St. Joe at Marble Creek; since then have been most all the time around on the St. Joe waters and St. Maries. I have operated a mill up near Clear Creek on the north fork of the St. Joe. I was up there about a year and a half in 1907 and part of 1908. I cruised these lands above Avery and between Avery and the

(Testimony of Arthur E. Douglas.)

summit of the Bitter Roots up to the north fork of the St. Joe. In 1907 and 1908 I was looking over land for Mr. Flewelling; I did not buy any of the land, but I was familiar with the prices paid and had considerable to do with the deals; looked over nearly all of the land. Mr. Flewelling bought timber in that country. He is the managing agent of the Monarch Timber Company and Milwaukee Land Company. He bought an awful lot of timber; I should say probably 70,000 acres on these rivers and the Clearwater. I do not know the full amount. I was familiar with the value of the stumpage timber on the St. Joe River in 1907 and 1908. For white pine the limit was $2.00, the highest that I heard of, knew about. Lots of it was bought for a dollar a thousand.

As to the market value of stumpage of white fir, red fir, tamarack and spruce,—if it was simply mixed timber, then it would not [283] have any value; the people that I was with would not buy it; if there was sufficient white pine mixed with it, they would probably give fifty cents a thousand. The Lake Coeur d'Alene basin and Lake Coeur d'Alene country was the market for all of the St. Joe and St. Maries and Coeur d'Alene countries, everything delivered in Coeur d'Alene Lake.

When I was there it was an isolated country and difficult to get in there with supplies of any kind; there is a road built in although when we first went in there was no road to where I located a mill. That road was started, I believe, in the fall of 1907 and

(Testimony of Arthur E. Douglas.)
completed during the winter some time, probably before the first of the year 1908. That road was built by the Chicago, Milwaukee & St. Paul Railway Co. of Idaho. It was what they called the "tote" road. I have examined this exhibit 35. In a general way I did notice the location of the timbers referred to in this exhibit, the sections and subdivisions. I am familiar with the localities where these sections are. I had been all through there several times. I am acquainted with the facilities for logging and the condition of the country.

It is a rough, rugged country; long slopes to these hills; too steep for railroad except in the main creeks.

You could put a railroad up those creeks such as north fork and Clear Creek, but the side draws where the timber grows is too steep to build a railroad.

The timber grows on those sidehills and there is only a small amount of it along the main creeks.

The timber that I logged on Clear Creek I think probably was the best bunch of timber up there; it was the best that I saw. It was a better logging chance because the timber was better; the timber was bigger and thicker. As far as the ground was concerned, it was practically all the same, steep, rugged ground.

The cost of logging in that country under the conditions as they existed in 1907 and 1908 would be very expensive. It would [284] probably cost $12.00 in to Coeur d'Alene Lake. The items to make up that total would be first to build camps and roads; the camps would probably be fifty cents a thousand;

(Testimony of Arthur E. Douglas.)

the cost of roads would probably be fifty cents a thousand; the cost of cutting logs 75 cents; swamping and cutting roads to the logs would be, I should say, $1.50 per thousand, totaling probably $3.00. The next item, you would have to bank them on the river in some of those brooks that you were going to drive; and burning your brush. Burning brush would be about 75 cents where you were cutting under Forestry regulations. The cost of the drive to a navigable point along the North Fork to the Lake before you reached the boom limits would be, I should say, about $2.00. I do not know the Boom Company's charges.

In carrying on our logging operations at Clear Creek in 1907 and 1908, we carried them on as cheaply as we could under the conditions. We had to log there all winter long; and it is foolishness to attempt to log there in the winter under the conditions; we had to do it anyhow. I know very closely what it actually cost me to log there—to get logs down to the mill at Clear Creek—the average would be about $9.00 per thousand I think. To get the logs just to the mill. We did not have any drive. We had to haul in places probably a mile, and then haul them on trucks probably a mile to two miles to the mill.

Assuming that the timber, a total of 10,261 trees, making a total of 4,045,700 feet board measure scattered over 1344 acres of land in the Government subdivisions pointed out in this exhibit, I do not think that in 1907 or 1908 it could be logged for the

(Testimony of Arthur E. Douglas.)
price of $9.00 to $10.00 per thousand in Lake Coeur d'Alene.

I have examined these exhibits showing the number of trees of each kind and their location.

Taking the conditions as they were in 1907 and 1908, a man could not go up there and log that stuff for what he could get for it in the lake. It would not be of any value up there scattered [285] around.

I am familiar with the country on the St. Joe below Avery. Comparing that country for logging chances and for timber with the country above Avery on the North Fork of the St. Joe, it is a better country, most of it; better growth of timber and easier to get into; a less distance to get your supplies and men there and outfit; cheaper country in every way to log in.

As to the North Fork of the St. Joe above Avery in its condition as it existed in 1907 before any rocks or obstructions were placed in the stream in the course of railroad construction, I do not believe you could drive it successfully for any amount of logs,—you might take a few out in high water, without improving it; you would have to put some dams in there to make a success of driving.

In my estimate of cost of logging in that country, the cost of dams is covered,—at least one little dam. I am familiar with the cost of logging lower down on the St. Joe below Avery; it runs an average probably of about $7.00 from Avery to St. Joe. I have logged

(Testimony of Arthur E. Douglas.)

there myself since 1907 and 1908, before that; not in those years.

The stumpage market and lumber market in the years 1907 and 1908 and since then was the best I ever saw in that country, the highest price per stumpage was in 1907 and just previous to that, for a year or two before that. There was a break in the lumber market I think in the early part of 1908.

The market for stumpage is very low; you can hardly sell any at all unless it is something very handy. That condition has existed since the early part of 1908.

The Blackwell Lumber Company did not cut anything but white pine and yellow pine and black pine on their own lands; they would not buy anything else. They do not make any allowance for stumpage for red fir, white fir or spruce or tamarack. We are operating on the St. Maries River now. The Blackwell Lumber Company own some lands on the St. Joe. They have not operated there at all, the reason being they can't break even on it. It costs more to produce [286] than you can get out of it. That has been the condition since 1907.

Referring to the items of cost of manufacturing logs as testified to by Mr. Skeels in this case, as follows: 80 cents for cutting and felling; $1.30 for skidding to the river; 25 cents for banking; $1.00 for driving down to where the St. Joe Improvement Company would take it; 75 cents for the Improvement Company's charge; there is not included all of the items which are necessarily incurred in the cost of logging. When you start a logging outfit you

(Testimony of Arthur E. Douglas.)
have got to get some place to keep your men; you have got to get in there, get a road in there and you swamp your timber to make roads to it. You have got to burn brush and I think with the exception possibly of the cutting, it is lower than I have ever heard of logs being put in in the best of the St. Maries country.

Assuming that 4,457,000 feet of timber was scattered over 1,344 acres of land in different sections and Government subdivisions shown in this exhibit, it could not be logged from one camp.

The effect upon the cost of logging would be to make it more expensive; there would be more roads, more camps, more improvements of every kind before you got to putting in any logs.

When you are buying timber seedlings are not considered at all. In cruising timber you do not estimate it where it is too small for logs.

When I was operating this mill up Clear Creek I was cutting for the railroad company, not for anybody else. We sold some side lumber to other parties; that was stuff that comes off the side of the logs, that we could not possibly put into railroad material. We sold it to those contractors up there for building camps; we sold it to saloon men at Grand Forks for saloons and buildings of one kind and another. None of it was shipped out of the country while I was there. [287]

Cross-examination by Mr. HENDERSON.

Q. If the timber referred to in Exhibit 35, extending over something like 1,300 acres, was in reality a

part of a solid body of timber before it was consumed by fire, did that have any effect on your estimate as to its value?

A. The size of the tract affects it from the logging standpoint.

Usually when a fire goes over a country it destroys most of the timber.

Mixed timber predominated in this area covered by the Government exhibit, as I recollect it. We figured the white pine against the mixed and the mixed is all the different other kinds.

As shown by this Exhibit 35 the predominating species is white pine.

Q. What percentage was white pine?

A. About 30 per cent.

Mixed timber was 70 per cent. I did not figure on the different kinds of mixed. Red fir did not at that time have a greater value than white fir or other species included in the mixed species. It is true that in a sale on which I was working the species we would purchase were white pine and red fir.

Q. And that no other species were taken?

A. No.

If a large percentage of the timber on this area was red fir, that would not affect my estimate as to its value,—because they did not want that red fir at all, even though they took it up there on our job; they wanted just the white pine.

I cannot say how many camps would be necessary if I were going to log that area mentioned in Exhibit 35 until I looked it over. In a level country it is

(Testimony of Arthur E. Douglas.)

not practical to travel over a mile; there is nothing level up there. Without looking the country over I could not tell where I would locate the camp. I cannot tell how [288] many logging roads I would need to put in.

My estimate as to the cost of logging is based on an ordinary bunch of timber that a man would go on to log; a proposition scattered as that is would not be practical to log at all.

Q. Would that be true if the timber, while scattered over a considerable area, still had the larger portion of it in packed bunches on different draws heading up from the North Fork of the St. Joe?

A. It would depend some on the size of the bunches in each draw. If it was all in one bunch, you would not have to build so many roads, but in any of that country I ever saw there was only a small amount of timber in each draw.

The actual conditions on the ground would be what would determine the value of the timber there. I never made a careful estimate of this particular area with a view of logging it.

Q. Are you familiar with the operations in Big Creek of the Milwaukee Lumber Company?

A. I have been up there some. That area does not resemble this area in controversy so far as the logging chances are concerned.

It is a rough, broken country, but there is a great deal more timber there, a greater body of timber and it is better timber.

(Testimony of Arthur E. Douglas.)

Q. In what respect would the logging chance be different?

A. It is easier to get there with supplies and outfit and you can put a railroad up the main creek.

The haul to the river would not be less in the area in controversy than it would be in the area up Big Creek. It would be less on Big Creek because it is from the railroad tract back, the timber is there, there is lots of it, they pick up right from the railroad with a jammer.

On this area logging by steam skidders would not be practical at all.

In August, 1907, when I went there the railroad operations had been going on for some little time, I believe. They had not [289] already thrown debris and rocks down the hill toward the St. Joe River. They had not got to grading on that side of the hill when I went over there to amount to anything. They were building camps and trying to build that wagon road.

On the North Fork below the mouth of the East Fork there had been some grading done. It is possible that at the time I first saw the St. Joe River it had already been obstructed by rocks by the railroad company. At that time the "tote" road was practically complete. It was completed to about two miles of the mill site. I would say it would be about half a mile above the town of Grand Forks.

It would have been possible to put mills in at a much nearer point than Coeur d'Alene Lake, a mill at St. Joe. There is a very poor chance for mills

(Testimony of Arthur E. Douglas.)
up there. The large mill now at St. Maries is below St. Joe. I do not believe there is a location above St. Joe that would be suitable for a mill.

The white pine referred to in my testimony as having been sold in 1907 and 1908 for $2.00 stumpage was purchased at those prices from homesteaders and from the timber companies and individuals. There was at that time an awful lot of timber in this neighborhood not owned by homesteaders. That was purchased at that time by the railroad company. Those prices was what was paid to everybody. Either in 1907 or 1908 there were a number of contracts that were sold that did not belong to homesteaders.

Q. And how near was that to this area?

A. On the St. Joe, St. Maries, Potlatch. None below St. Maries. It was up the St. Maries River, on the St. Joe above St. Maries; below St. Maries Reservation.

Q. How large a tract was it that you know of being sold about that time on the St. Maries River?

A. The tract I have reference to was partly on the St. Maries and partly on the St. Joe; I do not know how much of it was on the [290] St. Maries, that is, the acreage; I am familiar with the land all right, but I never figured up the acreage.

Q. Have you approximately any idea of the extent of the acreage or the amount of timber?

A. Not the total amount. It was in big tract. I examined all the lands. I did not have anything to do with the actual payment for it nor see the money

(Testimony of Arthur E. Douglas.)

handed over. My only knowledge about the price was what someone told me and from seeing the checks after it had been bought.

A quarter section on the river bank would be worth as much as any block of timber; if there was a quarter section in the hills back some place that you would have to improve a lot to get, it would not be worth near as much; as a matter of fact, it would not be worth anything if too far back. A quarter section on the river would pay to log. The price paid to homesteaders for their timber in those years would depend largely on the situation of the land with reference to logging operation. That affected the price.

I did not have in mind any particular place for locating the little dam which I stated would be required in logging the North Fork of the St. Joe. A man has got to have some way of controlling the water in any of those little streams; it would be necessary to pick a place where the flowage would be best, probably up some place where you could get run and flowage. I do not believe it would be practical to attempt to log it at all, with any great amount of logs unless you had some improvements there.

That 70,000 acres purchased by Mr. Flewelling or the companies with whom he was connected was not any of it on the Little North Fork of the St. Joe nor tributary to it. The nearest tract that I recollect included in that 70,000 acres I presume on a straight line would be about 15 miles.

Q. On what stream is that?

(Testimony of Arthur E. Douglas.)

A. They are all on tributaries of the St. Joe; all of the timber was on streams tributary to the St. Joe. [291]

Q. How far from the St. Joe itself?

A. Some of it was right on the river bank and some of it was back probably as much as 8 miles up those streams. There was a small amount on the Clearwater.

That 70,000 acres is a pretty nice holding; every tract almost except what was on the Clearwater was big enough to justify a logging operation, a good big logging tract.

Redirect Examination by Mr. DUDLEY.

I was familiar with the location of the right of way of the Chicago, Milwaukee & St. Paul Railway up along the North Fork of the St. Joe. It would be almost impossible to log along that right of way on account of the timber that is on the upper side of the track; there is no place that you could get a siding in to load it; on the lower side you could not get it back up to the track.

My estimate of the cost of logging it applies to that timber generally, whether it is as low down as the right of way or lower down or higher up.

I am familiar with the lands purchased by Mr. Flewelling and the companies that he represents on the Clearwater. I *looked most* of them.

Q. How is the timber there compared with the timber up on the North Fork of the St. Joe?

A. It is about the same proposition, as regards the quality of the timber; it is a more isolated country a

(Testimony of Arthur E. Douglas.)

good deal than the St. Joe.

The lands that were purchased by Mr. Flewelling and the companies which he represents along the St. Joe that I have testified to with respect to the logging chances, as compared with the timber up above Avery, along these locations described in this exhibit on the right of way through that country are better logging jobs, all of them; they are bunched up bodies of timber on those creeks, and they are better logging chances than any of this upper St. Joe North [292] Fork that ever I seen.

Recross-examination by Mr. HENDERSON.

Before it was constructed the railroad would not have interfered with logging the trees growing on its right of way, but it would not have been very simple to have gotten them down those side hills a mile or two to the creeks.

Q. Timber along that portion of the side hill could have been logged comparatively easy, couldn't it?

A. The railroad would not have interfered with it at all. It would have been easier except from Clear Creek up in the region where the railroad was up close to the summit on hills; of course, it would not interfere with the body of timber there.

I don't think that I did give any figures for logging that thirteen hundred acres. I was figuring on an ordinary logging job that a man would take and put into the river; stuff as scattering as that it would not be practical to attempt at all.

Q. Then, as a matter of fact, when you gave those figures, you had no particular area in mind, other

(Testimony of Arthur E. Douglas.)
than giving general figures that might apply to logging operations?

A. Yes, I had the area that we have logged over in mind.

Q. And that is the only area that you had in mind when you were giving those figures?

A. No, I took into consideration all of the logging that I could think of that I have done in this country.

The logging cost is not always the same on different areas.

So if it cost the amount I have stated on Clear Creek it might cost either more or less than that some other place even within a comparatively short distance, owing to different characteristics of the ground. [293]

Redirect Examination by Mr. DUDLEY.

Taking into consideration the scattered character of the timber as shown on this Exhibit 35 and the conditions up in that country as I am familiar with them, the figures I give would not log that at all, I don't think, the stuff situated as that is, scattered around.

That is, my figures are below what it would cost actually to log this land or on land along the right of way.

Re-recross-examination by Mr. HENDERSON.

I never examined that land with a view of logging it.

In estimating timber as it is bought in this country the concerns that I have worked for do not consider stuff that is too small for logs at all.

(Testimony of Arthur E. Douglas.)

Re-redirect Examination by Mr. DUDLEY.

When I was out there for the purpose of locating this mill that I afterwards located on Clear Creek I did look over the country generally for the purpose of taking up the best location and for the best logging chance. I looked it over in general and then I had a man working for me that had been up there ahead of me and worked it over and he pronounced this the best for a mill.

In making that investigation I traveled over some of the lands described in this exhibit. The logging chance that I selected was the best I saw up there.

[Testimony of R. C. Lammers, for Defendant.]

R. C. LAMMERS, a witness for the defendant, after being sworn testified as follows:

(Examination by Mr. DUDLEY.)

My full name is R. C. Lammers. I am Superintendent of the McGoldrick Lumber Company. I have been engaged with that company in that capacity about six years. My duties are buying timber and [294] having it estimated and looking after the logging and all of the outside work. I had at times cruised timber myself. I am familiar with the St. Joe River and its tributaries in Idaho up as far as Avery and with the St. Maries River.

The McGoldrick Lumber Company have tributary to the St. Joe property in the neighborhood of twelve to fifteen thousand acres. That is located, speaking generally—above the head of navigation and below Avery. Principally located along the main river

(Testimony of R. C. Lammers.)
and Dry Creek, Marble Creek and practically every one of the tributaries.

That timber land was purchased under my own supervision. I am familiar with the prices which were paid for those lands and also for the timber lands along the St. Maries. I am familiar with the price of stumpage in that country between the years 1907 and 1908; we bought, I suppose, about five thousand acres in those two years.

The market value of stumpage in 1907 and 1908 from the country tributary to the St. Joe above the head of navigation, between there and Avery, depended on the location and accessibility of the timber; that is the way we base our values; and we based it entirely on the white pine basis and paid from fifty cents to $2.50, and $2.75, I guess, is the highest price we paid. We gave mixed timber no consideration, except to estimate it. We do not give mixed timber any value at all.

Referring to what logging companies generally in this country have done, there are instances where it was readily accessible and they could log it and put it into the Coeur d'Alene Lake at what they considered its value. Timber other than white pine mixed in would have little value. I never paid over a dollar a thousand for mixed timber stumpage. I never paid anything if they were on the St. Joe; some places in the St. Maries we did.

Sometimes we would buy the land and sometimes the timber only; mostly always acquired the land.

(Testimony of R. C. Lammers.)

In buying from a homesteader or where an entryman had made an entry but had not yet received patent, we would pay him the same price and probably hold back a small amount of the payment until the patent was delivered. In all cases we have the title investigated before we buy it and only buy where we have a favorable report of the title, a good title. The question of title has never affected the price.

For white pine timber along this country tributary to St. Joe that I have bought in the years 1907 and 1908 I would say, offhand—that I paid probably on an average of $1.25; $1.00 to $1.50 a thousand for white pine, that is what the actual cost would be. We paid nothing for mixed timber.

We considered white fir the same as any other mixed timber; we would rather have the red fir or tamarack than white fir, but there is very little difference in any of them. A pile of white fir logs alone would have some market value but we would not consider them as we would red fir or tamarack.

I am not familiar with what they called lodgepole. We considered black pine similar to mixed timber or yellow pine.

In those years we bought quite a number of logs in Lake Coeur d'Alene.

Referring to the situation of the timber market in 1907 and 1908, commencing in 1906 we had the best timber market we have had since we have been in the country during our six years here, and in the fall of 1907, the time the panic came on, there was

(Testimony of R. C. Lammers.)
a depression in the market value both as to timber and lumber generally; it has been in a similar condition ever since.

Referring to the market value of white pine logs in Coeur d'Alene Lake in 1907 and 1908, we paid anywhere from $8.00 to $9.00 a thousand for them.

We bought more yellow pine than anything; we paid from $7.00 to $7.50 for yellow pine and mixed timber, and for spruce we paid [296] from $5.00 to $6.00 a thousand. These were the market prices for logs of that class at that time.

We were buying in competition with all of the mills on the lake; we probably bought, I should say, offhand, 20 per cent of the logs that were put in.

I have a list of the purchases of the logs that I made in the lake in those years with the prices and dates of the purchase. I made the memorandum and got it from our original record. I made some of the purchases myself; myself or Mr. McGoldrick made all of them. I did not see the money paid or make the payments; this statement was taken from our original checks.

The first purchase was made October 7, 1907. There was 88,660 feet of mixed logs—white pine, yellow pine and mixed; we were giving $7.00 a thousand for them.

The next was October 31st the same year, we purchased 27,300 feet of white pine at $8.50; 13,000 feet of yellow pine at $7.00; 18,530 feet of mixed logs at $6.00.

The next purchase was February 7, 1908, on yellow

(Testimony of R. C. Lammers.)

pine, 53,560; 91,820; 39,450; 52,820; 73,090; that was purchased at $7.00 a thousand.

The next bunch on May 14, 1908, there was 8,690 feet of yellow pine at $7.00; 25,160 feet of mixed logs at $5.00.

The next purchase was on May 18th, 55,990 feet of mixed logs at $5.00.

On June 17th, 16,910 feet of yellow pine at $7.00; 82,250 feet of mixed at $5.00.

June 30th, 58,520 feet of white pine at $8.50; 7,550 feet of yellow pine at $7.00; 155,690 feet of mixed logs at $5.00.

June 30th, 15,570 feet of white pine at $8.50; 9,320 feet of yellow pine at $7.00; 27,350 feet of mixed logs at $5.00.

July 3d, 15,460 feet of yellow pine at $7.00; 3,530 feet of mixed logs at $5.00. [297]

July 27th, 45,980 feet of yellow pine at $7.00; 550 feet of mixed at $5.00.

July 14th, 122,340 feet of yellow pine at $7.00; 1,410 feet of mixed logs at $5.00.

July 18th, 62,640 feet of yellow pine at $7.50; 1,770 feet of mixed at $5.00.

July 25th, 49,280 feet of yellow pine at $7.50.

July 31st, 14,500 feet of yellow pine at $7.00; 630 feet of mixed logs at $5.00.

July 31st, 33,100 feet of yellow pine at $7.00; 3,010 feet of mixed logs at $5.00.

September 1st, 89,980 feet of yellow pine at $7.00; 8,820 feet of mixed logs at $5.00.

September 28th, 70,720 feet of yellow pine at $7.50;

(Testimony of R. C. Lammers.)

11,920 feet of mixed logs at $5.00.

October 3d, 66,820 feet of yellow pine at $7.00; 4,650 feet mixed logs at $5.00.

October 6th, 5,510 feet of white pine at $8.50; 479,270 feet of yellow pine at $7.50; 24,720 feet of mixed logs at $5.00.

October 3d, 75,550 feet of yellow pine at $7.50; 53,260 feet of mixed logs at $5.00.

October 6th, 24,220 feet of white pine at $9.00; 2,290 feet of yellow pine at $7.50; 81,630 feet of mixed logs at $5.00.

October 6th, 23,950 feet of white pine at $9.00; 7,700 feet of yellow pine at $7.50; 48,440 feet of mixed logs at $5.00.

October 15th, 1,380,000 feet of white pine at $8.75; 119,220 feet of yellow pine at $7.50.

October 15th, 58,520 feet of yellow pine at $7.00; 56,000 feet of white pine at $9.00; 36,300 feet of yellow pine at $7.50; 8,970 feet of mixed logs at $5.00.

October 9th, 2,850 feet of white pine at $9.00; 42,830 feet of yellow pine at $7.50; 25,010 feet of mixed logs at $5.00. **[298]**

October 31st, 3,930 feet of white pine at $9.00; 2,910 feet of yellow pine at $7.50; 10,180 feet of mixed logs at $5.00.

October 31st, 7,880 feet of white pine at $5.00; 5,790 feet of yellow pine at $7.50; 21,130 feet of mixed at $5.00.

October 31st, 58,850 feet of white pine at $9.00; 33,660 feet of mixed logs at $5.00; 800 feet of white pine at $9.00; 44,900 feet of yellow pine at $7.50;

(Testimony of R. C. Lammers.)

8,500 feet of mixed logs at $5.00.

November 4th, 25,460 feet of yellow pine at $7.00.

November 9th, 10,810 feet of yellow pine at $7.00; 7,540 feet of mixed logs at $5.00.

November 30th, 58,850 feet of white pine at $8.50; 33,660 feet of mixed logs at $5.00.

December 24th, 2,830 feet of white pine at $9.00; 67,010 feet of yellow pine at $7.50; 9,680 feet of mixed logs at $5.00.

That is everything we bought at Coeur d'Alene Lake for those two years. The logs were delivered at our booming grounds at Coeur d'Alene Lake. That is about four miles from Coeur d'Alene. We furnished the boom sticks.

I have superintended and carried on actual logging of lands along the St. Joe River. Am doing so at the present time. Logging by one camp about six miles above St. Joe at Zane, Idaho, and one at Calder, Idaho, that is about twelve miles above St. Joe. Our other St. Joe operation is on the main Slate Creek. I am familiar with the cost of logging operations.

We operated at Calder last November and about sixty days ago we checked up our logging operations. What we had put in then cost us about $8.25. That timber is situated on Section 11, Township 45, Range 2 East. The north side of the section borders along the St. Joe River; probably all within a couple of hundred yards of the main St. Joe River. [299]

It is a steep country to work in. It is probably a ten degrees slope from the St. Joe to the back end

(Testimony of R. C. Lammers.)
of the section. A steady slope down towards the river. As to its being a favorable or unfavorable logging chance, it is considered just about fair for the St. Joe; there are lots of better ones and there are lots harder than that. We have just one logging camp there.

I have got at the office what one department of the logging costs; the sawing, the felling and skidding and everything is figured on separate. The total amount is $8.25 in the St. Joe River. To drive from that point down to the lake last year it only cost us 25 cents. We don't include the charge of the St. Joe Boom Company. Their charges are 10 cents from this particular point and 60 cents for boomage. That leaves our logs at the upper end of the Coeur d'Alene Lake.

We cut nothing but white pine there.

The camp at Zane, Idaho, is in Section 19, Township 46, Range 2 East. Corners on the river. That is a fair chance for the St. Joe River. The slope is probably a little bit steeper than the average land that slopes to the St. Joe River. We are logging all of Section 19.

We put in of white pine about five million feet off the section; finished up the camp last week.

It will cost us about $6.75 to log the white pine, that is, to put the logs in the St. Joe River. The cost of running them from there down to the lake would be the same figures that I gave. About 60 cents would go for drive; 25 cents for booming; 10 cents for poles; towing 10 cents. That would make the

(Testimony of R. C. Lammers.)

cost to those logs in the lake $7.75 outside of the stumpage. That is the best operation we ever put in there. We have commenced operations on Slate Creek. We are logging a very good chance. We are logging right along the main Slate Creek. We won't go a quarter of a mile back in any place. [300]

With respect to Slate Creek being a good logging stream, it is an experiment; we do not know whether we can drive it or not, we think we can. We are logging into the creek. We let a contract before we started operations there of $8.00 a thousand to drive them into the St. Joe boom. The cost of logging will depend on the conditions. We have got camps to build, logging roads, sawing, swamping, decking, hauling and driving to be included in the cost of logging.

In our logging operations along the St. Joe white pine is all that we have been taking with one exception. Where we had a logging contract we were taking mixed timber off of the St. Joe at one time, under a cheap logging contract. The reason for that is we cannot put it from the St. Joe River into the lake and break even on the market on the manufacturing cost. The cost of the logs in the lake is greater than the market price in the lake; we have left mixed timber on Section 19 and Section 11; on all of our operations up there we never take any mixed timber except as I said.

Referring to the Government subdivisions shown in Exhibit 35 where the timber is situated, I know

(Testimony of R. C. Lammers.)

the general location of them. I know where section 46 and 7 is.

Q. Glancing over that, Exhibit 35, the question I want to ask you is, whether or not those lands could be logged from one logging camp, or would it require several on account of their distance from each other?

Mr. HENDERSON.—Objected to as the witness has not shown any particular familiarity with this area in question.

A. I take it from the Government descriptions here that the lands are probably five miles distant from one point to the other. In that case the timber could not be logged from one camp.

The McGoldrick Company has of standing timber about 350,000,000 feet and that has been purchased since 1905. The average cost has been somewhere in the neighborhood of a dollar a thousand.

NOTE.—Mr. Henderson objected to the testimony as to the price paid by the McGoldrick Lumber Company for timber during the years 1905 to [301] 1910, inclusive, on the ground that it was immaterial.

That land is located on the St. Maries River, the St. Joe River and on the Spokane-International Railway Tributary to Spokane. On the St. Joe I would say, roughly, we have 125,000,000 feet, possibly a little more.

NOTE.—Mr. Henderson objected to the question with reference to the price paid by the McGoldrick Lumber Company for 125,000,000 feet of timber on the St. Joe River, on the ground that it was immaterial.

(Testimony of R. C. Lammers.)

The cost of that probably stands us fifty cents a thousand. We first began buying in the St. Joe country in the [302] early part of 1906 and our purchases in 1906 were probably 2,000 acres; 2,500, maybe. The prices were higher in 1906 and the early part of 1907 than they have been since.

Cross-examination by Mr. HENDERSON.

I have not been over this particular area that is in controversy in these proceedings.

Part of this timber that the McGoldrick Lumber Company has been purchasing during the past five or six years has been bought from homesteaders and other public land claimants, and part of it from companies; most of it from homesteaders. [303]

[Testimony of Chas. B. Sanderson, for Defendant.]

CHAS. B. SANDERSON, a witness for the defendant, after being sworn, testified as follows:

(Examination by Mr. DUDLEY.)

My full name is Chas. B. Sanderson. I am an accountant working for the Milwaukee Land Company; that is the company of which Mr. A. L. Flewelling is managing officer. I have been with Mr. Flewelling five years. When Mr. Flewelling first came here he bought timber in his own name; then in the name of Monarch Timber Company and then the Milwaukee Land Company. He began buying timber in Idaho in the spring of 1906.

I have handled all the accounts and seen that charges were made properly. I countersigned the checks and vouchers. We buy on cruiser's reports as to the quantities of timber.

(Testimony of Chas. B. Sanderson.)

All the lands bought by Mr. Flewelling for the Monarch Timber Company have been turned over to the Milwaukee Land Company and are held now by the Milwaukee Land Company. Those timber lands are located from 37, 1, 2, 3, East, Boise Meridian, up to 47—1, west to 46, 1, 2, 3, East. That covers the basins of the St. Joe and St. Maries and Clear Water. Mr. Flewelling began buying in the St. Joe basin in 1906.

As to the average value of stumpage on the St. Joe between Avery and the head of navigation in the years 1907 and 1908, I can tell what we paid. It was from $1.00 to $2.50. That is on the kind of stumpage that would be 40 per cent white pine and the balance mixed; it would run that.

The Milwaukee Land Company holds about two billion feet and better of timber land in Idaho. The average cost of it has been $1.82.

I have made a statement of particular purchases along the St. Joe that were made by the Milwaukee Land Company in 1907 and 1908, and I have it here. It shows the stumpage, year of purchase and the price. It shows the quantity of timber of each kind; [304] white pine, red fir, white fir, yellow pine, cedar, tamarack and spruce in each particular section. These were the purchases in 1908 and the spring of 1907.

Q. Is it a record of all the purchases in the St. Joe region?

A. On the 3 principal creeks that come into the St. Joe River; I did not take anything outside of that.

(Testimony of Chas. B. Sanderson.)

It covers all the ground that is drained by these creeks.

In preparing this I simply made extracts from the books.

NOTE.—The paper referred to offered in evidence, and marked Defendant's Exhibit "AA."

NOTE.—Mr. Henderson objected to the introduction of this exhibit on the ground that it was incompetent, irrelevant and immaterial, and that the facts purported to be set forth were not based on the personal knowledge of the witness. But not on the ground that this is not the book of original entry.

Our mills are located at the head of navigation, 40 miles above the Coeur d'Alene Lake.

Referring to the lumber market generally at the time of the panic in 1907—lumber fell off considerable at the end of 1907. Since that time we have had offerings on stumpage on all parts of that country at a lower figure than those figures that I gave you. We won't buy mixed timber at the present time. We are cutting nothing at the present time but white pine. There is no market for our mixed. Since 1907 and 1908 we have never been able to trade dollars even on mixed lumber. What we paid for the stumpage plus the manufacturing cost makes the selling price less than the cost.

I had supervision over the records and accounts of all of the operations that were carried on at what they call Clear Creek mill by Mr. Douglas in 1907 and 1908. All expenditures in connection with that enterprise were paid by me. I countersigned all

(Testimony of Chas. B. Sanderson.)

the vouchers. The cost of logging operations there was about $14 a thousand. [305]

Mr. Flewelling bought timber stumpage from settlers and from lumber companies.

NOTE.—Mr. Henderson objected to the question as to the cost of logging operations on Clear Creek as irrelevant and immaterial.

With reference to investigating the status of the title before making the purchase—they are all passed and an attorney's letter was given before payment was made. We considered that if [306] the title was not good, we would not look at it, and if a patent was not issued, an amount was held back until patent was issued, and it has been paid now in every case. In making the price there was absolutely no depreciation in value for timber because the land was unpatented or because of the status of the title.

Cross-examination by Mr. HENDERSON.

I never examined any of these areas that are referred to on Exhibit "AA." I never cruised any of them. I have no personal knowledge of the stand of timber on any of them. At the time that I prepared this memorandum, I had no personal recollection of the details of any of these transactions.

I have been along the right of way of the Chicago, Milwaukee & St. Paul Railway Company of Idaho on the area involved in this suit from Avery up to St. Paul Pass Tunnel on foot. I have examined the timber in a casual way in February 1908 and 1909. At that time I was not making a cruise or estimate of

(Testimony of Chas. B. Sanderson.)

the timber. I was there three times in 1910. All my trips were made early in 1908 and 1910.

[Testimony of Matthew B. McBride for Defendant.]

MATTHEW B. McBRIDE, a witness for the defendant, after being sworn, testified as follows:

(Examination by Mr. DUDLEY.)

My full name is Matthew B. McBride. My occupation is chief clerk of the chief engineer of the Chicago, Milwaukee & Puget Sound Railway Company at Seattle. I have been connected with the engineering department of the Chicago, Milwaukee & Puget Sound and the Chicago, Milwaukee & St. Paul Railway Companies of Idaho, Washington and Montana, two years and a half. Before that I was about one year paymaster and chief bookkeeper for Winston Bros., a company of contractors. Their contract covered between Butte and Avery; all that part of the line from the Summit or St. Paul Pass west down to Avery. As chief clerk in the engineer's office I handled the contracts which were made for that work. I have with me the **[307]** original contract which was made for that work by the Railway Company to Winston Bros. covering from Butte to Avery.

(The witness produces a paper.) This is the company's duplicate of that contract.

NOTE.—The contract referred to offered in evidence. It is stipulated that the original and copy shall be left with the stenographer and upon comparing them, if he finds they are correct, the copy

(Testimony of Matthew B. McBride.)
will be substituted for the record in this case, subject to the same objections made by counsel for the plaintiff to the introduction of the original.

The copy admitted in evidence and marked Defendant's Exhibit "HH."

Henderson objected to the exhibit on the ground that it was irrelevant, incompetent and immaterial to any of the issues raised in this case, and for the further reason that it appeared to be introduced principally to contradict a material admission already made by the defendant in the record. No objection was made to the substitution of the copy for the original contract.

Winston Bros. did sublet the work between the Summit of the Bitter Root and St. Paul Pass Tunnel and Avery. Whenever they made a subcontract, a triplicate of it was delivered to and filed with the Railway Company. I have these triplicates here with me.

Those six contracts—one to George Foss & Co.; one to Rylander & Lund; one to Walter Arnold; one to Sturtevant & Proctor; two to Stewart & Welch—covered all of the right of way work except bridges between St. Paul Tunnel and Avery to the best of my knowledge.

Papers offered in evidence marked Defendant's Exhibit "BB," "CC," "DD," "EE," "FF," and "GG," respectively.

NOTE.—Mr. Henderson objected to the introduction of these exhibits for the same reasons advanced against the admission of Exhibit "HH." **[308]**

(Testimony of Dorr Skeels.)

No objection was made to the substitution of copies for the originals.

REBUTTING EVIDENCE TAKEN BEFORE J. D. HOGAN, SPECIAL EXAMINER, AT COEUR D'ALENE, MAY 7, 1912.

[Testimony of Dorr Skeels, for Complainant (in Rebuttal).]

DORR SKEELS testified as follows:

(Examination by Mr. HENDERSON.)

I am the same Dorr Skeels who testified in this case in the hearing at Coeur d'Alene, Idaho, April 12, 1911. I have been in the continuous employ of the forest service since that date. **[309]**

Referring to testimony by Mr. Douglas, a witness for the defendant, as to the practicability of logging the timber scattered over 1344 acres of land in the burned district,—the entire watershed of the East Fork of the North Fork of the St. Joe River was well timbered; there was some two hundred million feet of timber in the watershed. These acres that were burned over were in that heavy stand of timber. The fires simply burned in different places along the right of way, burning a little area here and there. The timber was not scattered. It could have been logged at a profit. Situated as it was at that time the timber on these burned areas did comprise a part of a good logging chance.

The statement of Mr. Douglas relative to the market value of stumpage for white fir, red fir, tamarack and spruce, in which he said if it was simply mixed timber, then it would not be of any value, the

(Testimony of Dorr Skeels.)

people that I was with would not buy it; if there were white pine mixed with it they would probably give fifty cents a thousand—is not correct. The mixed timber of the species named and of the quantity which was cut and burned in this district had a sale value at that time of about $4.00 per thousand. It was of excellent quality for mining timbers, square timbers and ties, and that class of material, and had a very high value. The wagon road from Taft down to the mouth of the Little North Fork that joins the East Fork and the North Fork of the St. Joe River was built late in the spring and early summer of 1907, about June.

I am familiar with the situation of the timber logged over by the Monarch Lumber Company when that company cut lumber on Clear Creek in 1907 or 1908, which was used in the construction of the railroad. I have been over the ground many times. I was there at the time the operations were going on. The logging chances at that place compared with the logging chances of the timber which was cut and removed from the right of way of the railroad between Avery and the Summit and the adjoining strip to the right of way,— [310] the timber of Clear Creek was a very much harder chance. It was a very much harder logging chance than the timbers in the burnt areas involved in this suit.

The cost of logging differs in different localities. It is not possible to get the cost of logging a body of timber without having first examined the ground with reference to the size and quantity of timber and

(Testimony of Dorr Skeels.)

the physical characteristics of the locality. To get at the value of the standing timber, timber must be cruised and the ground examined, first, to determine the quantity of timber; and second, to determine the method of logging it, the location and amount of logging improvement and the cost of each part of the logging operation.

Referring to the testimony of Mr. Douglas, a witness for the defendant, in which he specified the different elements of cost of logging—there are items included there by Mr. Douglas that would not be necessary in logging the timber on the right of way involved in this controversy. He mentions the building of roads; there was a road built down through this entire logging place before the timber was cut upon the right of way and before the timber was burnt. He mentioned a place to keep his men; that was covered in my testimony by a one dollar overhead charges, which were not mentioned in the question put to Mr. Douglas. The housing for men would not exceed about five cents a thousand,—there would be no swamping of roads to the timber in this case. The only swamping needed would be in skidding; that is always part of the work of the skidding crew, but you would not use any roads, and there was no law at that time requiring brush to be burnt. This timber grew right close to the stream and it would be skidded direct from the stump to the stream and there would be no use of roads.

Referring to an item in Mr. Douglas' testimony of $3.00 for hauling—there would be no hauling ex-

(Testimony of Dorr Skeels.)

penses because as is shown **[311]** on the map which I made on the ground and which is part of the record, the right of way bordered on the stream and the timber would be skidded from the right of way to the stream.

I observed the logging on the Clear Creek area. In my judgment the logging on that area was not done in an economical manner; it was one of the most poorly handled logging operations that I ever saw.

"A. In the first place, the labor was a poor quality; they were near a bunch of saloons and disorderly houses, the management was poor and the handling of the men was lax, the different parts of the logging operations were not properly proportioned to each other, at times there were not enough saws in the woods for the crews and at times there were not enough men for the saws. They tried to log it in very deep snow. They sent men out with shovels who had to shovel away two or three feet of snow from each tree which they cut down, as the trees would fall in the deep snow and have to be uncovered and places shoveled for the men to saw in in cutting the logs, over a large part of the operation they decked the logs on skids and melting snow ran down between them and froze them in and they had to break out the deck with powder in order to loosen the logs to load them. The roads were poorly made so that they couldn't haul half as much as they should have hauled at a load. The wrong method of logging was used in that the logs should never have

(Testimony of Dorr Skeels.)

been decked, loaded and hauled, but should have been drayed direct from the stump to the mill."

The cost of that operation would not be a fair basis on which to estimate the cost of logging the timber involved in this controversy, because the logging operations on Clear Creek was poorly handled and badly mismanaged, and because the type of timber and type of country was entirely different from that of the timber and ground along the North Fork of the St. Joe River and the East Fork of the St. Joe River on the right of way. **[312]**

Referring to the testimony given by Mr. Douglas, stating that it would not have been very simple to have gotten the logs down those side hills a mile or two to the creek—over two-thirds of the timber on the right of way stood either on the banks of the stream or not more than two or three hundred feet from the stream and only about five per cent of the timber was more than a fourth to a half of a mile from the stream and the balance of the timber wasn't over a fourth of a mile from the stream. That would be true also as to most of the timber burnt in these various fires involved in this suit because the fires started from the right of way and were adjacent to the right of way.

Referring to the testimony of Mr. Douglas relative to a break in the lumber market and the condition of the market for timber since 1908,—in 1907, we started selling timber up there for $4.00 and $5.00 a thousand and in some cases as high as $6.00, and ever since that time, except during the fire season of 1910

(Testimony of Dorr Skeels.)

when logging could not be done, there has been a steady demand for timber in that region. Now, that that timber has been burnt and badly damaged, we are still having a good many applications to buy timber there. They are paying $4 and $5 for green timber and $2 for that **[313]** that has been burnt and damaged by fire, and if that timber was green we could sell the whole watershed for not less than $5 a thousand.

Railroads are not built upon the side hills in logging timber, but are always located in the valleys of the main streams.

Cross-examination by Mr. DUDLEY.

I think the Government made a sale of a lot of timber in that district to the McGoldrick Lumber Company. That sale was in Slate Creek, not in this watershed. Nor in this burnt district. Slate Creek flows into the main St. Joe several miles below where the right of way of this railroad leaves the forest.

Q. That sale to the McGoldrick Lumber Company was at a price not exceeding $1 a thousand for the white pine, and took nothing but white pine, was it not? A. I don't know.

Q. You haven't been connected with the sales in this burnt district?

A. Yes, I work in the timber sales department of the office of the district forester about three months every year, and I have been over this right of way too since I have been in Libby, so that I have a general knowledge of the timber sale business of the whole district. I am not familiar with all the sales

(Testimony of Dorr Skeels.)

made by the government in this burnt district.

The McGoldrick Lumber Company purchase was one of the biggest of the deals in that section.

Q. And you don't know anything about that at all? A. No.

Redirect Examination by Mr. HENDERSON.

I have been over the Slate Creek area at other times. I am familiar with the situation of the lumber there with respect to the location of the river and facilities in logging.

Compared with the logging chance of the timber involved in **[314]** suit, the timber there is as good as the timber of the right of way, but it is a very much harder logging chance. Slate Creek is a very much smaller stream than the North Fork of the St. Joe and it is also a much rougher stream; it goes through narrow, rocky canyons in many places and it is a much more costly stream to drive.

[Testimony of George A. Hamilton, for Complainant (in Rebuttal).]

GEORGE A. HAMILTON, a witness for plaintiff, testified as follows:

(Examination by Mr. HENDERSON.)

I am the same George A. Hamilton who testified in this case April 12, 1911, at Coeur d'Alene. Since that time I have been engaged principally in the scaling and looking after timber sales for the Government in the forest service. During this time I have had opportunity to observe logging operations in connection with the sales.

(Testimony of George A. Hamilton.)

During this year I have been employed on the North Fork of the Coeur d'Alene River. The species of timber they are handling in that area are white pine, Douglas fir and tamarack, principally. I have been employed by the forest service in connection with the sale of timber on Big Creek, a branch of the St. Joe River above St. Joe.

To estimate the cost of a logging operation, a fellow has got to go over the ground in order to get the logging cost of any timber, especially in this western country where it is mountainous and rough, and also on any streams not logged before. And it is not possible to get a correct figure, unless you go over the ground pretty thoroughly. I have been over the defendant's right of way between Avery and the Summit, before the railroad had been constructed and several times since.

Answering the question as to whether or not in logging the timber which formerly grew on the right of way on the adjacent ground between Avery and the Summit, it would not be necessary to expend **[315]** in hauling the timber to the stream as great a sum as $3 per thousand—the hauling from the given area to the river would be very small, inasmuch as it would be only skidded from the stump to the river in most places. It would not be as great as $3 a thousand. The expenditure of this amount would not be necessary in hauling the timber to the stream from any portion of the right of way or of a strip not exceeding 300 ft. on each side of the right of way between Avery and Summit.

(Deposition of George A. Hamilton.)

It is not a fact that in skidding the timber from any portion of the right of way or the strip referred to between Avery and the Summit, it would be necessary to skid it a distance of from one to two miles in order to reach the stream. The average distance this timber would have to be skidded to reach the stream would be a good deal less than one-quarter of a mile.

[Testimony of Charles H. Gregory, for Complainant (in Rebuttal).]

CHARLES H. GREGORY, a witness for the plaintiff, testified as follows:

(Examination by Mr. HENDERSON.)

I am the same Mr. Gregory who testified for the Government at the hearing in this case held at Coeur d'Alene April 12, 1911. Since last April, I have been in the forest service in charge of timber sales, cruising and estimating in the St. Joe forest principally. In the past year I have been employed on the branches of the St. Joe and Big Creek. I was in charge of the Big Creek timber sales last spring. During this time I have had opportunity to observe logging in the country tributary to the St. Joe River. I am familiar with the location of the right of way of the defendant corporation between Avery and Summit. I have been over it many times. I am familiar with the area of Clear Creek from which timber was cut which was used in connection with construction of this railroad in 1907 and 1908. I have been over this area. **[316]**

The logging chance of that area compared with the

logging chance along the right of way of the defendant between Avery and St. Paul Pass Tunnel are quite different.

The cost of logging the timber which was cut from the Clear Creek sale area would not be a fair basis upon which to estimate the cost of logging timber on any portion of the right of way or adjacent ground between Avery and Summit.

Answering the question as to whether or not in logging the timber which formerly stood on the right of way of the defendant between Avery and the Summit and upon land adjacent within 300 feet of it, it would be necessary at any point to haul from one to two miles to the bank of the North Fork of the St. Joe or the East Fork of the North Fork—seventy-five per cent of the timber along the right of way could be skidded to the river. It is within 400 or 500 feet of skidding distance and probably the balance could have been reached at an average distance of one-quarter of a mile from the river.

It is not possible to arrive at a correct estimate of the cost of logging in a given area without first going over the ground carefully and noting the different topographical features and the situation of the timber with respect to streams or other avenues by which it could be marketed.

In the cost per thousand for logging in a small sized logging chance or in a large sized one, there is a difference in the cost of improvements, and the more timber you cut from an area, the less the cost would be.

(Testimony of Charles H. Gregory.)

I do not think that the cost per thousand for logging an amount of timber approximately four million and a half would afford any basis for arriving at the cost of logging timber in one drainage to the extent of fifty or seventy-five million feet.

[Testimony of James W. Girard, for Complainant (in Rebuttal).]

JAMES W. GIRARD, a witness in behalf of the plaintiff, after [317] being sworn, testified as follows:

(Examination by Mr. HENDERSON.)

My name is James W. Girard. My residence is St. Maries, Idaho. I am employed in the forest service; have been since the 15th of November, 1907; since that time my duties have consisted chiefly of timber sale work and cruising. I have had experience in lumbering or logging prior to entering the forest service. I ran a mill of my own for better than two years in the State of Tennessee. I was employed by John D. Ransom Lumber Company, at Nashville, Tennessee.

I have been connected with logging operations most of the time for the last fifteen years. I have worked for the B. R. Lewis Company at this place in 1907 up to the time I commenced working for the forest service, with the exception of two months. I was employed by the Black Foot Mill Company at Cedar Lake, Montana, as ratchetsetter. While employed by the B. R. Lewis Lumber Company I was in the region across the lake from here near Mica Bay.

(Testimony of James W. Girard.)

Since I have been in the forest service I have not been employed on any of the sales in Northern Idaho, but I have been estimating timber on the St. Joe and its tributaries since January 21st, 1912. During this time I have passed over the right of way of the defendant between Avery and the Summit quite a few times.

I have helped estimate the timber of the Clear Creek branch. I have passed over the area from which timber was cut on Clear Creek for use of the defendant in the construction of its road.

The Clear Creek chance, as compared with the logging chance along the right of way between the North Fork and the tunnel or Summit, would be much more expensive, owing to the fact that the skidding distance would be much greater, and the amount of improvements necessary to log the timber would require a much greater expenditure [318] of money.

In logging the timber which formerly stood upon the right of way of the defendant between Avery and the Summit and upon a strip on each side of the right of way not exceeding 300 feet, it would not be necessary in taking the logs to the stream below the right of way to haul them a distance of from one to two miles. It would not be necessary to have any hauled whatever. None of the timber is located as far from the railroad as two miles. To put the timber in the river, a portion would be logged probably by hand-logging, and the remaining portion would be skidded direct from the stump to the stream, except a small

(Testimony of James W. Girard.)

portion of the area near the tunnel, where it would be necessary to construct a road. I don't know just exactly what length.

The features that determine the cost of logging are distance, topography, size of timber, density of stands, character of the underbrush, management, efficiency of labor, kind of equipment and weather conditions. It would not be possible to arrive at a correct estimate of the cost of logging a given area without first making a careful examination.

Answering the question as to whether or not, in logging the timber growing on the right of way and the adjacent strip between Avery and the Summit, it would or would not be necessary at any point to expend $3.00 per thousand for hauling the timber to the creek,—it would not be necessary unless a man wanted to skid the logs downhill and haul them back and try to see how much expense he could make; it would not be necessary to haul at all. [319]

TESTIMONY ON BEHALF OF COMPLAINANT TAKEN BEFORE ALBERT C. WELLS, ESQ., NOTARY PUBLIC, AT 412 FIFTH STREET, N. W., WASHINGTON, D. C., ON APRIL 1, 1912.

[Testimony of James B. Adams, for Complainant.]

JAMES B. ADAMS, a witness for the plaintiff, after being duly sworn, testified as follows:

(Examination by Mr. WILLIAMS.)

My name is James B. Adams; age, 45; residence, Washington, D. C. I am Assistant Forester in the Forest Service. In the year 1907, I was Assistant

(Testimony of James B. Adams.)

Forester (Plaintiff's Exhibit "C" read to the witness). I am the James B. Adams mentioned in this paper as Acting Forester. I knew George R. Peck at the time that paper was signed, but I am not able to state whether the paper was signed in Mr. Peck's presence or not. I am sorry to say I have no recollection whatever of any conversation with him regarding this case at that time. I have no recollection of the circumstances surrounding the application of the Chicago, Milwaukee & St. Paul Railway Company of Montana for a right of way across the Helena National Forest. I have no recollection of that particular case. I have no recollection of any conference with Mr. Peck prior to or at the time this agreement referred to as Plaintiff's Exhibit "C" was signed, nor of any conversation with Mr. Peck in regard to the status of the land over which his railroad proposed to construct this road. If it took place, it has entirely passed out of my recollection.

It was not stated by me or any other representative of the Forest Service, in my presence, and in the presence of Mr. Peck, that the lands over which the defendant proposed to construct its road were in a national reserve created by the President prior to the time the defendant filed its maps in the local Land Office.

Answering the question whether or not prior to the time Mr. Peck signed the agreement known as Plaintiff's Exhibit "C," I or anyone connected with the Forest Service stated to Mr. Peck that the situation in respect to the company's application over the lands

(Testimony of James B. Adams.)

in Idaho [320] were the same as the Chicago, Milwaukee Railway Company of Montana in the Helena National Forest—I have no recollection of any discussion of that subject.

I am unable to state whether I was or not present at a conference or series of conferences in October, 1907, with H. H. Field and George R. Peck in Washington, representing the defendant company, at which there was discussed the question of a stipulation for right of way for the Chicago, Milwaukee & St. Paul Railway of Washington, through the Yakima Forest, in the State of Washington.

I am in all probability the Mr. Adams referred to in the testimony of Mr. H. H. Field referring to negotiations with officials of the Interior Department with reference to the procuring of the right of way through the Coeur d'Alene Reservation, in which he stated: "I think that Mr. Adams was present during some of these negotiations, but I am not certain whether he was there at this time."

I have absolutely no recollection of those particular interviews. I have participated in interviews and conferences on so many similar cases during the past five years that it is absolutely impossible for me to remember any particular one, unless there was some unusual circumstance connected with it; and I have no recollection whatever of the particular conference that Mr. Field refers to in that testimony.

Answering the question whether or not at any time during the negotiations between Mr. Peck and the Forestry Service which culminated in the signing by

(Testimony of James B. Adams.)

Mr. Peck of the agreement, Plaintiff's Exhibit "C," or after the signing of that agreement, I ever stated to Mr. Peck that if he signed the agreement under a misapprehension of the facts as to the respective dates upon which the company's maps were filed in the local Land Office and the date of the President's proclamation creating the Coeur d'Alene National Forest, the Government would not hold the company to that agreement—I could not possibly ever have made such a statement as that, because I do not see what it could have to do with the case. It is not my understanding now, and has [321] never been my understanding, that those circumstances would have any bearing whatever on the question of requiring execution of stipulation. I do not know the law in this matter, but I am stating my understanding of the opinions we have had from the law officers.

NOTE.—The defendant moved to strike out all of the answer, except the first sentence, on the ground that it is not responsive to the question and that it is immaterial.

Before or at the time Mr. Peck signed the agreement, Exhibit "C," on May 10, 1907, I had considered the question of the authority of a railway company under the Act of March 3, 1875, to secure a right of way on land temporarily withdrawn for inclusion in a National Park with reference to securing approval of the Forestry Service and filing with the Forestry Service stipulation for the protection of the lands.

To the best of my recollection Mr. G. F. Pollock was in May, 1907, chief of the office of lands in the

(Deposition of James B. Adams.)

Forest Service. He is dead.

Cross-examination by Mr. FIELD.

I have no recollection of any conversation with you or Mr. Peck at any time, in connection with this particular case—no definite recollection.

[Testimony of Philip P. Wells, for Complainant.]

PHILIP P. WELLS, a witness for the plaintiff, being duly sworn, testified as follows:

(Examination by Mr. WILLIAMS.)

My name is Philip P. Wells; age, 44; residence, Washington—my legal residence is in Connecticut; my occupation is Chief Law Officer of the United States Reclamation Service in the office of the Secretary of the Interior. Until the latter part of March, 1907, I was employed in the law office of the Forest Service; Mr. George W. Woodruff at that time being the law officer in charge of all the legal work. I was in Mr. Woodruff's office. Then Mr. Woodruff having been appointed Assistant Attorney General in the Interior Department, I was [322] made law officer of the service in charge of all the legal work and held that position throughout the rest of the year—I was given certain administrative duties in addition to the legal duties and held the position of Assistant Forester. That may have been in 1907. I do not know.

I do not definitely recollect the circumstances connected with the signing of the agreement, Exhibit "C," in May, 1907. I knew Mr. Peck very well. I do not recollect any conversation at that time. I do

(Testimony of Philip P. Wells.)
recollect, very distinctly, conferences with Mr. Peck later, relating to that. I have no recollection as to who prepared this agreement that Mr. Peck signed on May 10, 1907. I know what the routine of the service was at that time, which would show where it was prepared; but recollection, I have none.

I cannot fix the dates of subsequent conferences whether in October, 1907, or at some other time. I do recollect several conferences with Mr. Peck and at least one with Mr. Field concerning rights of way by some one of the subsidiary companies of the Chicago, Milwaukee & St. Paul over certain forests. I remember very distinctly several conferences with Mr. Peck on the subject of the question as to whether or not the Chicago, Milwaukee & St. Paul Railway Company of Idaho could lawfully be required to execute and file stipulations for a right of way across the Coeur d'Alene National Forest. I remember less distinctly discussing the subject briefly when Mr. Peck and Mr. Field were together. I do not fix the date as October, 1907. After May 10, 1907, I discussed with Mr. Field and Mr. Peck this matter. The matter was first called to my attention by Mr. Peck in my office room. Mr. Peck was alone. It was some time before the latter part of the year 1907, to the best of my recollection. Mr. Peck called my attention to the fact that when the company filed its application maps for right of way in the Coeur d'Alene forest, the land was under temporary withdrawal by an order of the Secretary of the Interior, with a view to its inclusion in a National Forest to be

(Testimony of Philip P. Wells.)

proclaimed by the [323] President; that, a few days thereafter, the President's proclamation issued; that, subsequent to the issuance of that proclamation, the company changed its layout for its right of way very materially. Mr. Peck then made the point that before the issuance of the President's proclamation, the company had a right to locate its line and get a right of way, without filing any stipulations with the Forest Service. That proposition I denied at that time, and consistently ever afterwards until the present time. I told Mr. Peck that all the right the company had was under the act of 1875 and the Amendatory Act of 1898, I think. The act of 1875 expressly says that it has no application to lands specially reserved from sale. The act of 1898 made an exception to that provision, in giving the Secretary of the Interior authority to approve applications of that character over forest reserves and reservoir sites, though they are specially reserved from sale, when in his judgment that was compatible with the public interest, or words to that effect. I told Mr. Peck that he was on the horns of a dilemma; that either this was a forest reservation when it was under withdrawal by the Secretary of the Interior for forest purposes, in which case the company was subject to such stipulations as might be imposed—or the lands were specially reserved from sale and the company could not get in there under any circumstances whatever; and the first alternative, I told him, was my view of the law.

I was present at a conversation between Mr. Pinchot, Chief of the Forest Service, and Mr. Peck in

(Testimony of Philip P. Wells.)
regard to the matter of the company's application for right of way across the Coeur d'Alene National Forest. Mr. Field was not present. This matter had been discussed several times between Mr. Peck and myself; each of us adhering to the legal claims we made. Mr. Peck had suggested a compromise and the details of that compromise were the subject of the conferences. Mr. Peck proposed, as a compromise, that the company stipulate to clear and keep clear of inflammable material such a strip of land, adjoining and in addition to its right of way as the Forest Service [324] found necessary to prevent fire risk; second, that with respect to the timber so cut and cleared on the part of the company's layout which had not been changed since the issuance of the President's proclamation, that the company should not be required to pay for the timber so cut; but as to the part of the timber cut on that portion of the lay-out which had been changed since the President's proclamation, that the company should pay for the timber so cut.

Answering the question whether or not there was any discussion at that time of the right of the Government to require a railroad company to execute and file stipulations for right of way under the act of 1875 over lands in a state of temporary withdrawal—it was mentioned; I am not sure that it was discussed. I advised Mr. Pinchot that my opinion of the law was as above stated and the conference proceeded on the basis that the Forest Service would maintain that view.

Answering the question whether or not at this time

(Testimony of Philip P. Wells.)

Mr. Pinchot or anyone else officially connected with the Forest Service stated to Mr. Peck or Mr. Field that if Mr. Peck signed the agreement of May 10, 1907, known as Plaintiff's Exhibit "C," under a misapprehension of facts relative to the dates upon which the company's maps were filed in the local Land Office and the proclamation of the President creating the Coeur d'Alene National Forest, that the Government would not hold the company to that agreement—no such statement was made at that time by me or by Mr. Pinchot, not at any time by me, nor at any time in my presence by any member of the Forest Service, without contradiction by me, if at all.

I do not recollect having gone with Mr. Field in the fall of 1907 to the office of Mr. Woodruff where there was discussed the question of the right of a railroad company to cross lands under temporary reservation without executing the stipulations required by the Interior Department. I do not recollect any such meeting with Mr. Woodruff and Mr. Field.

I am certain that I did not, prior to May 10, 1907, state to Mr. Peck that the President's proclamation creating the Coeur d'Alene [325] Forest antedated the filing of the company's maps in the local Land Office in Idaho. I have no knowledge of it.

I am certain that I made no statement to Mr. Peck before the signing of the stipulation of May 10, 1907. That the situation in regard to the application of the company for right of way over the Coeur d'Alene National Forest was the same as the Montana Company's application for right of way across the Helena National Forest, in so far as concerned the respective

dates upon which the maps of the company were filed in the local Land Office and the dates of the President's proclamations creating the forests.

Cross-examination by Mr. FIELD.

Referring to the Helena right of way matter—to the best of my recollection I was informed about it throughout its progress. I am uncertain whether I scrutinized the papers—I can only give you the routine of the service and my duties at that time. I do not know, as a matter of fact, that the Montana Company did not file its maps through the Helena Reserve until after the proclamation had been issued. I do not remember the date of the proclamation creating the Helena Reserve. Assuming that the proclamation creating the Helena Reserve was issued April 12, 1906, and that the Chicago, Milwaukee & St. Paul Railway Company of Montana filed its maps through the Helena Reserve in the local Land Office on August 23, 1906,—if those dates are correct—no question ever arose in respect to the Helena Reserve of the effect of filing a map before the proclamation was issued.

No such question ever arose as far as I know. Answering the question whether Mr. Peck signed this stipulation shown as Exhibit "C" in respect to the Washington or Wenatchee Forest—to the best of my recollection there were several forests through which a line was to be built and with respect to same or all of them, similar arrangements were made as in the case of the Helena. [326]

I do not recollect definitely that you were here with respect to the Washington stipulation, but I recollect

(Testimony of Philip P. Wells.)

very definitely a conference at which you and Mr. Peck were present in respect to some of these forests. I cannot distinguish as to which forest it was. I recollect that the Coeur d'Alene matter was mentioned while you were present. I do not recollect definitely anything with respect to the Wenatchee (paper handed to the witness). That paper is a memoranda which contains my conclusions on the subject and my advice that I gave in respect to the situation in the Coeur d'Alene Forest, growing out of the fact that the maps of the first line were filed prior to the proclamation. The date of that memoranda is December 2, 1907. I understand as a result, or growing out of the difference of opinion in respect to the proposition involved, this suit was brought; that is, the suggestion had been made for a friendly suit to test this question and later on this present suit was brought. That date being December 2, 1907, makes me suppose that that was the time when this matter was brought to my attention by Mr. Peck. We then made the suggestion that there being no dispute as to the facts, we could allege them by bill and have the legal question tried out. Subsequently Mr. Peck proposed a compromise which was discussed in the conference with Mr. Pinchot to which I have referred. I understand that was not accepted by the railroad company. Mr. Peck said he would do his best to get it approved; but since it has not been carried out, I assume it was not.

My recollection is that shortly before that, Mr. Peck brought this to my attention and we had discussed it in my office once or twice very shortly before

(Testimony of Philip P. Wells.)

this and I had placed this on the record.

As I understand the matter, the question of the authority of the Government to exact a stipulation when the railroad application was filed while the lands were under temporary withdrawal, and before the President's proclamation of the forest issued, could not arise in the Helena case and did arise in the Coeur d'Alene case, and in that respect the two applications are somewhat different—I ought to add [327] that the legal status was the same—that is a matter of opinion. It was on that question that the railway company and the Government differed and the Government's action was based on the opinion I have stated. I understand that the railway company refused to sign the Coeur d'Alene stipulation upon the ground, principally, that it had filed its first map at a time when the lands were under temporary withdrawal and before the proclamation was issued.

I do not recall the details about the negotiation with respect to the Washington stipulation—referred to as the Yakima Forest. What is contained in the memoranda Mr. Field showed me is the fullest information I now have. I assume that in respect to the Wenatchee Forest in Washington Mr. Peck had signed a similar paper to Exhibit "C." I do not remember that. I remember a conference with you (Mr. Field) and Mr. Peck and Mr. Cox in Mr. Cox's room and some man in Mr. Cox's office. I do not remember what it was about, but my impression was that it was about some timber question. I think it was Mr. Carter who was in Mr. Cox's office but I am not sure. I do not recall anybody else. I do not

(Testimony of Philip P. Wells.)

remember the conference with Mr. Woodruff of the Interior Department in respect to that matter, but I do not mean to intimate that there was no such a conference; I do not recall it. I do not recall the terms of the Washington stipulation as it was finally executed. I see by reference to the memoranda you showed me of December, 1907, that the reclamation service was in some way involved in the Wenatchee matter, which would make it proper for a conference with us—the Reclamation Service being in the Interior Department. I do not remember the particulars as to the dates of the temporary withdrawal of the Washington reserve or the date of the filing of the map or the date of the filing of the execution of the stipulation.

I do not remember the fact that in the Washington stipulation, the requirement as to the payment for timber similar to the requirement of the Helena stipulation, as set forth in Exhibit "B" next to the bill, was waived—not otherwise than as shown by memoranda [328] of December 2, 1907. It appears from that memoranda that it was so waived. I assume that the change in the terms of the Washington stipulation as compared with the terms in the Helena with reference to the payment for the timber was brought about by some different conditions existing at Washington reserve as compared with the Helena. I do not know that in the Washington reserve that the maps were filed prior to the proclamation and after the temporary withdrawal. I suppose the record will show.

I suppose that Exhibit "C" was drawn in the office

(Testimony of Philip P. Wells.)

of Mr. Pollock, who had administrative charge of these matters under Captain Adams; but I do not know. As to whether that stipulation and the stipulation entered into with reference to the Washington reserve were practically identical in terms, I am unable to say, further than this: That the precedent set in the Helena Forest was followed in other cases and I suppose in all "like" cases; meaning, where your company desired to construct in advance of some formal stipulation, some stipulation like this was filed, whereby you promised that you would sign the usual stipulation as nearly as practicable, as in the case of the Helena. I am speaking of the preliminary stipulation which allowed you to go ahead with the construction. My answer did not apply to the permanent stipulation.

NOTE.—Mr. Field, counsel for the defendant, requests complainant to produce and attach to this deposition a copy of the stipulation executed by Mr. Peck in respect to the right of way through the Washington forests, similar in terms to Exhibit "C"; also a copy of the final stipulation entered into with respect to the same reserve under date of January 24, 1908.

Mr. WILLIAMS.—"Subject to all objections to the materiality of these papers, the Government will comply with the above request."

I have stated that I never personally made this statement to Mr. Peck, that if he had signed Exhibit "C" under a mistake as to the fact, he would not be held to it; I understand that the difference referred to in the testimony of Mr. Peck and Mr. Field is that

(Testimony of Philip P. Wells.)

arising [329] out of the fact that the map was filed before the proclamation was issued and while the land was under temporary withdrawal, and that the only claim by which this piece is differentiated from the Helena—I would not undertake to say but what some official of the Forest Service may have made that statement; I simply testified that I did not make the statement nor hear it made. That is all. My recollection is very clear, because the point of law involved in it first came to my attention when Mr. Peck saw me sometime before that memorandum of mine of December 2, 1907, and I then took very decided grounds on the matter, and the whole subject was one that was considered a very important one in the office. The point of law was this: "Is land under temporary withdrawal for inclusion in a forest reserve a forest reservation, within the meaning of the Act of 1898, which empowers the Secretary of the Interior to approve maps of railroad rights of way for forest reserves if, in his judgment, not incompatible with public interest?" That point of law arose by reason of the contention on the part of the railroad company that it had acquired some rights by its filing before the proclamation. The fact as to whether Mr. Peck knew at the time he signed the stipulation "C" that the maps had been filed before the proclamation issued, did not raise that point of law—not if I understand your question.

Q. What I am getting at when I ask you if you are positive that no statement was made to this effect by you or in your presence, that if he had signed the stipulation "C" without knowledge that at the time

the maps were filed the proclamation had not issued, he would not be held to the stipulation?

A. I am positive; yes, sir.

Q. You mean to say that you made no such statement and heard no such statement made by any other official? A. Yes, sir.

Q. You understand, do you not, that Mr. Peck has testified and Mr. Field has also testified to the effect that if when he signed the [330] stipulation he had no knowledge that the maps had been filed prior to the proclamation, he would not be held to the strict terms of the stipulation?

A. I understand that Mr. Peck and Mr. Field have so testified. I understand also that Exhibit "C" requires the formal stipulation to be one like the Helena stipulation, so far as practicable—that is my understanding of it, without recently reading it. I understand that the question of law which I have already stated was at that time and has ever since been in dispute between the railroad company and the Government, is the subject of this suit.

I did not, nor the Government did not, rely absolutely upon Exhibit "C" as creating the obligation on the part of the railway company to sign the final stipulation for the Coeur d'Alene Forest. If Exhibit "C" had been a nullity, or never existed, the question still remains.

Exhibit "C" simply purported to be a stipulation and it referred to the Helena stipulation in general terms. But aside from any such stipulation, the Department claimed that it had the power to require the execution of the stipulation in suit as a condition of

(Testimony of Philip P. Wells.)

approving the maps for the right of way. Exhibit "C" was taken from the railroad company simply for the purpose of accommodating them, by allowing them to go ahead with their construction, without waiting for the necessary formalities of the final stipulation. In a sense, in order to go ahead with their construction, they were compelled to sign Exhibit "C." They were trespassers until Exhibit "C" was signed. I presume that if it had not been signed, the Department would have stopped any work of construction. I should have so advised.

Redirect Examination by Mr. WILLIAMS.

Exhibit "C" had no reference to the relative dates upon which the railroad had filed its maps in the local Land Office and the dates the President had created the respective National Forests. [331] Its sole purpose was to fix the duty of the railroad company, chiefly with reference to protection against fire.

I was the Law Officer of the Forest Service prior to May 10, 1907. I held that position from some time in the latter part of March of that year continuously until May 10, 1907, and thereafter for a considerable time.

I am confident that I had not, prior to May 10, 1907, advised the Forester in reference to the right of the Government to require a railway company to execute and file stipulations for right of way across lands in temporary reservation. The question had never arisen.

Recross-examination by Mr. FIELD.

We have always contended that there was no difference in the legal sense in the duty of the railroad

(Testimony of Philip P. Wells.)

company between applications for right of way made by the filing of a map when lands were under withdrawal merely, and applications made by the filing of a map after the proclamation. We gave consideration to the different facts (a paper handed to the witness). That is Exhibit "D." I note there that the application referred to is based upon the act of 1875 and also upon the act of 1899. This reminds me that I have erroneously spoken of it as the act of 1898. I judge from the stipulation that it was the act of 1899 that authorizes the Secretary of the Interior to approve maps of right of way in any forest reserve where the public interests would not be injuriously affected.

(The proposed stipulation which the Government is seeking to enforce in this action, which appears in the bill as Exhibit "G," handed to the witness.)

I do note the fact as to the first paragraph of the preamble, and there appears to be no reference elsewhere, in this stipulation to the act of 1899. The document shown me seems to make no such reference.

[Testimony of Overton Westveldt Price, for Complainant.]

OVERTON WESTVELDT PRICE, a witness for the plaintiff, being duly sworn testified as follows: [332]

(Examination by Mr. WILLIAMS.)

My name is Overton Westveldt Price; residence Alexandria, Virginia; age, 39. I am Associate Forester of the Forest Service. (Exhibit "C" read to the witness.) Whether I had anything to do with Mr. Peck, with a view specifically to the execution

(Testimony of Overton Westveldt Price.)

or preparation of this agreement, I am not sure. I did see Mr. Peck frequently when he came to Washington and was in conference with him chiefly in the earliest inception of this whole matter. I recall no conversation with Mr. Peck prior to the signing of Exhibit "C" relative to the question of the right of the Government to require him to sign such an agreement when the lands proposed to be traversed by the company were in a state of temporary reservation and prior to the time the President actually created the forest.

When Mr. Peck first came to Washington he saw Mr. Pinchot and me in conference several times; the main question being then what were the necessary administrative restrictions upon the railroads in order to safeguard the National Forest—I think it was the Helena—which it was to cross with this railroad. We discussed the question of the width of the right of way; the question of oil burning was gone into and we agreed upon reasonable stipulations. After that my best recollection is that the matter was taken up by Mr. Wells as Chief Law Adviser of the Forest Service, by Captain Adams, and went forward, involving the preparation of the necessary papers; and neither Mr. Pinchot nor I took any prominent part in it. When Mr. Peck came to Washington, he used to be so kind as to call on me and Mr. Pinchot; but I do not recall taking up any specific business with him.

I remember no statement when Mr. Peck was in conference with me about the proposed right of way,

(Testimony of Overton Westveldt Price.)
that the Coeur d'Alene Forest had been proclaimed by the President before the railroad filed its maps in the local Land Office, nor any statement to Mr. Peck in these negotiations culminating in the execution of Exhibit "C," that the situation with respect to the right of way across the Coeur d'Alene was the [333] same as that with respect to the right of way across the Helena National Forest.

So far as I can recollect, I was not present at a conference or series of conferences during October, 1907, at the Forest Service in Washington when Mr. Peck and Mr. Field were there in relation to the application of the Chicago, Milwaukee & St. Paul Railway Company of Washington for right of way over the Yakima or Wenatchee National Forest; and to the best of my recollection I was in the West at that time—although I am not so sure about being in the West. To the best of my recollection I had no conversation with either Mr. Peck or Mr. Field at any time after May 10, 1907, in regard to Exhibit "C." I have no recollection of having stated to Mr. Peck or Mr. Field that if Mr. Peck signed Exhibit "C" under a misapprehension as to the respective dates of the filing of the maps in the local Land Office and the President's proclamation creating the Coeur d'Alene National Forest, the Government would not hold the company to Mr. Peck's agreement; and to have done so would have been entirely inconsistent with the policy of the Forest Service at that time.

NOTE.—Mr. Field moved to strike out the latter part of the answer as not responsive.

(Testimony of Overton Westveldt Price.)

I do not recall whether prior to May 10, 1907, I had ever considered the question of the right of the Forest Service to require a railway company to execute and file a stipulation for the preservation and protection of lands of the United States which were in a state of temporary reservation. I shared in its consideration after that date, in this particular case.

My best recollection is that the attitude of the Forest Service in 1907 was that we had the same right to require of a railroad company proposing to cross a National Forest reserve the protection of the National Forest in operation, when the lands were under temporary withdrawal as when proclaimed by the President. [334]

I was an Associate Forester in the Forest Service in 1907. It was essential that I should be familiar with the policy of the Forest Service in regard to these matters in order to conduct the functions of my office.

Cross-examination by Mr. FIELD.

Q. Have you any recollection of ever having met me before?

A. I have not, Mr. Field. I may have done so four or five years ago. As to having met you in the Forest Department in the first part of October, 1907, I would be obliged to say that to the best of my recollection, I did not; although I cannot state that with finality. I have no recollection of the conference in regard to the Yakima situation with Mr. Woodruff in which Mr. Peck and you were present. From the 1st to the 10th of October, 1907, I think I was in the west.

(Testimony of Overton Westveldt Price.)

The question as to how much the law requires of a railroad company in going through a forest or in going through land withdrawn for a proposed forest, is a legal question. I am not a lawyer.

Q. You did not assume to prescribe any conditions that the law imposed in respect to this stipulation, did you?

A. I assumed in a good many cases to prescribe conditions under the law. Those were conditions that I conceived to be essential. The question whether a railroad company could be compelled to sign any stipulation as a condition of obtaining a right of way in a forest was a question that I did not presume to pass upon; not as a lawyer. I did not, as a lawyer, assume to pass upon the question as to whether a railroad could be compelled to sign a stipulation as a condition of getting a right of way through lands withdrawn for a proposed forest. As an administrative officer, I did. I do not know definitely who promulgated the opinion for the advice of the Department on that question in the instance which I shall cite. I remember a conference in which Mr. Peck was present, in which Mr. Pinchot stated to Mr. Peck that the fact—which was a fact—that this stipulation had been [335] signed before the proclamation had been issued and while lands were under temporary withdrawal, did not justify him as Forester in modifying the conditions of that stipulation in any respect, nor in his judgment did the law justify him. I suppose he based his opinion on the attitude of the Forest Service at that time; on the recom-

(Testimony of Overton Westveldt Price.)

mendation of Mr. Wells, who was at that time his law adviser.

That was Mr. Pinchot's opinion based on the advice of his Department and probably Mr. Woodruff's also.

I understand that the point was that the map had been filed and the contention of the railway company is that Mr. Peck at the time he signed this stipulation did not know that the maps had been filed prior to the stipulation. I have knowledge merely that that point was raised by Mr. Peck and answered by Mr. Pinchot. Mr. Pinchot claimed that that did not alter the situation at all.

It is not my recollection that the railroad company recognized the desirability of clearing the right of way and the extra widths in all these forests. My recollection is that it was only as the result of a good many lengthy conferences with Mr. Peck that the railroad came to see that the clearing was advisable. They did finally come to that position, that they did not contest the clearing required by the Department. We had some good-natured passages with Mr. Peck. His disposition was, in the main, I think, that this was mandatory and he had better take it good naturedly. Whether he was, in his soul, convinced, I do not know. There was no serious contest.

My actions did not in any way in respect to the requirements imposed upon the railway company have reference to whether the maps were filed before or after the proclamation, to the best of my recollection. I treated all the established reserves and all

(Testimony of Overton Westveldt Price.)
reserves after withdrawal as the law treats them—as it does in agricultural cases. That is a legal fact.

I did not say I paid no attention to the question whether the maps were filed before or after the proclamation was made. What [336] I said was that that did not influence my action in such cases. Such questions were referred to the Legal Adviser and Mr. Pinchot's action and mine were based on that advice.

Q. You acted precisely, so far as you were concerned, the same in one case as in the other?

A. Precisely.

I was working under a policy which Mr. Pinchot had defined and in which I was in thorough accord. I was not taking my instructions in specific cases because that would mean a duplication of instructions. My policy was the same with respect to withdrawn lands as it was with reference to land under proclamation, to the best of my recollection it was the same. [337]

REBUTTING EVIDENCE TAKEN APRIL 4, 1912, IN MISSOULA, MONTANA, BEFORE P. J. O'BRIEN, A NOTARY PUBLIC.

[Testimony of F. A. Silcox, for Complainant (in Rebuttal).]

F. A. SILCOX, a witness on behalf of the plaintiff, being sworn, testified as follows:
(Examination by Mr. CLARKE.)

My name is Ferdinand A. Silcox; residence, Missoula, Montana; occupation, district forester, District No. 1, forest service. I have been in the forest service since 1903. I am a graduate of the Yale

(Testimony of F. A. Silcox.)

University forest school. I have worked with a lumber company supervising the loading of lumber in South Carolina and looking up lands for private parties. My first year in the service was in Colorado.

I returned to Montana the latter part of 1906. My headquarters were in Missoula and I moved over to Montana and Idaho north of Salmon River. From 1906 to December, 1908, I was one of the general forest inspectors of the district, and in December, 1908, when the district organization went into effect, I became associate district forester until July 11, 1911, when I was appointed district forester, which position I have held ever since. During the period I acted as inspector, with headquarters at Missoula, I covered, with immediate personal field and office supervision, timber sale work, inspecting operations in the field to insure the carrying out of the contract stipulations. This covered all northern Idaho and Montana, South Dakota, Minnesota and Michigan. My primary duty is to pass on timber sale contracts in the forest service, checking stumpage appraisals, conditions of sale, basis of payments, scaling, etc., and approving the final contract to the purchaser. I also handled special uses and other administrative work. I am constantly investigating the market and I do keep constantly in touch with it. I have been several times over the right of way of the Chicago, Milwaukee & St. Paul Railway Company of Idaho between St. Paul Pass and Avery. **[338]** My duties in this district embrace a study of logging conditions and supervision of forest sales

in what is now the St. Joe and Coeur d'Alene drainages. They cover the entire panhandle of Idaho. I had constant supervision of all the contracts and made a study of analytical logging reports to determine the accessibility of timber, cost of logging, to determine whether our methods were correct and timber sale contracts reasonable and practical. I not only had office but field supervision of these sales.

Since 1907 the demand for timber in the Coeur d'Alene and St. Joe region constantly increased until in 1910 it became so acute that we issued instructions to the forest supervisor in charge of the Coeur d'Alene Forest to curtail the cut. There was approximately 154 million under contract, but equally distributed on the St. Joe and Coeur d'Alene drainages. That was prior to the fires of 1910. Since the forest fires of 1910, the demand has been constant with a continuous increase. As a matter of fact we have about 290,000,000 ft. B. M. dead timber under contract at $2.00 a thousand out of approximately 400,000,000 estimated to be on the drainage and tentative applications for the remaining timber, both green and dead.

The price in practically all of our timber sale contracts for white pine and mixed species was $4.00 flat rate, or $3.00 for mixed species and $5.00 for white pine. A flat rate is a uniform rate applied in sales where there are a number of different species of different values. In other words the flat rate represents the average value, taking all species into consideration.

(Testimony of F. A. Silcox.)

"The demand for Forest Service stumpage in the St. Joe drainage since the forest fires of 1910, has been extremely active; so much so that we could sell all the green and dead timber we have on the drainage. We have actually under contract 290,000,000 out of 400,000,000 dead timber, with applications for 500,000,000 more of green. [339] The prices run from $1.00 to $2.00 for dead, and $4.00 to $5.00 for green, actual sales having been made at these prices."

I have here the contracts for the sales of dead timber. The application contract for the green timber I spoke about is now in the supervisor's office. I have here the contract with the McGoldrick Lumber Company on Slate Creek.

NOTE.—The contract referred to offered in evidence as Plaintiff's Exhibit "A" in connection with Mr. Silcox's testimony. [340]

Mr. DUDLEY.—We object to it on the ground that it is not proper rebuttal and not competent to the issue in the case. It may be stipulated that for the purposes of this case a copy of this contract may be substituted for the original, the original being part of Government files.

The WITNESS.—I have the contract with the Milwaukee Lumber Company for 100,000,000 ft. B. M. The Milwaukee Lumber Company had completed a contract for the green timber in 1909 at $4.00 per M. feet B. M. The fire of 1910 made it necessary to reduce the stumpage to $2.00 on account of the timber being fire killed.

NOTE.—The contract referred to offered in evi-

(Testimony of F. A. Silcox.)
dence as Plaintiff's Exhibit "B" in connection with Mr. Silcox's testimony.

Mr. DUDLEY.—I move to strike out the testimony of the witness with respect to this other contract on the ground that it is not proper rebuttal and not competent to prove any issue in this case.

The WITNESS.—We do not consider the price of logs in Coeur d'Alene Lake as a proper criterion for the price of stumpage for standing timber in the national forests of the St. Joe drainage. There are a number of reasons; the first is that the logs delivered on the lake were cut practically all of them off of homesteads or land where the timber was obtained for a little or nothing and logging was quite accessible, most of it being either short wagon hauls or skidded hauls to the lake. Another reason is that practically a monopoly existed on the lake for logs and the prices of logs were controlled by the manufacturers who took the lion's share and left the loggers with what they could get. We make our stumpage appraisals by figuring the manufacturer a reasonable profit on his investment and the logger the same, then determine what stumpage should bring under those conditions, figuring the log price from the manufactured price rather than the other way. The average manufactured price for lumber in that vicinity for white pine was [341] $20.00 to $25.00 per M and mixed species $16.00—$18.00.

The purchase price of timber on private lands is no criterion of the value of Government timber. The fact that under our sale contracts, Government tim-

(Testimony of F. A. Silcox.)

ber is purchased by short term payments, relieving the operator of carrying compound interest on his investment, relieving him of the fire risk, the Government standing the loss in case his timber is destroyed, and relieving the cost of fire protection, makes it obvious that a higher price can be commanded for stumpage on the national forests than on private land where none of these features are covered.

Cross-examination by Mr. DUDLEY.

In 1907, 1908 and 1909, the logs in the St. Joe basin were marketed down the Coeur d'Alene Lake until the railroad was built, but more than half of them are marketed at St. Maries at the present time. St. Maries is generally considered in the Coeur d'Alene basin, but the logs coming down do not enter the general Coeur d'Alene market. The mill at St. Maries is the Milwaukee Lumber Company mill.

We have applications for other mills to utilize timber on the St. Joe basin.

[Deposition of Wm. T. Cox, for Complainant (in Rebuttal).]

Deposition of WM. T. COX, in behalf of the plaintiff, taken before Claudius Bomback, a notary public, in St. Paul, Minnesota, on the 10th day of April, 1912.

WM. T. COX, being duly sworn, testified as follows:

(Examination by Mr. HENDERSON.)

My full name is Wm. T. Cox. My occupation during the year 1907 has been Assistant Forester in the

(Deposition of Wm. T. Cox.)

Forest Service in charge of the branch of Sylviculture.

Referring to the negotiations between the Chicago, Milwaukee & St. Paul Railway Company of Idaho and the forest service during the year 1907, relating to the construction of the company's right of way across the Coeur d'Alene National Forest—I took [342] part in the negotiations for this right of way and represented the Forest Service to some extent. I am acquainted with George R. Peck, who signed Exhibit "C" and was acquainted with him in 1907. It was in regard to that case that I first met him. I do not recall that I had any conference with Mr. Peck at any time prior to May 10, 1907, with reference to that right of way.

I did not have any conversation with Mr. Peck on or about May 10, 1907, with respect to the relative dates of the filing of the company's map of their right of way across the Coeur d'Alene National Forest and the proclamation of the President creating that forest. At that time I may have known that the first map of the railroad company's right of way across this forest was filed prior to the issuance of the proclamation, but I am not sure. The way we looked at cases of that kind was that it made no difference in regard to timber settlement, anyway, so that that fact wouldn't have impressed us.

I do not believe that I was present when Exhibit "C" was signed by Mr. Adams. I think that was signed on another floor of the building. It also appears that it was initialed by "G. F. P." That was

(Deposition of Wm. T. Cox.)

Mr. George F. Pollock. He is now dead.

Referring to a conference or series of conferences in the month of October, 1907, in Washington at which H. H. Field and George R. Peck represented the defendant, at which there was discussed the question of the situation of the right of way of the Chicago, Milwaukee & St. Paul Railway of Washington through the Yakima National Forest; also the right of way of the defendant across the Coeur d'Alene National Forest—I was present at a conference of that kind, but I don't remember the exact date of it. I remember that Mr. Field and Mr. Peck were present and it was some time in the fall of 1907.

I did not at any of these conferences make any statement either to Mr. Peck or to Mr. Field, in substance, that if Mr. [343] Peck had signed Exhibit "C" under mistake as to the facts, that I or the Forest Service or the Government would not hold him. I do not recollect hearing anyone else make such a statement at that time or at any of these conferences. I do not remember whether either Mr. Peck or Mr. Field, at any of these conferences, stated that the defendant in this suit would not execute such a stipulation as that referred to in this instrument signed by Mr. Peck. I don't think that any statement of that kind was made while I was in the conference; but, of course, I wasn't with them all the time. They called me in to discuss the timber phase of it.

Cross-examination by Mr. FIELD.

I remember that at the conferences both the ques-

tion with respect to the Washington Reserve and the question with respect to the Coeur d'Alene Reserve were discussed, although mainly the Coeur d'Alene Reserve, as I remember.

I do not recall what particular objection the Railroad Company had with respect to the proposed Washington stipulation. As I recall, it was some difficulty in regard to the Washington Forest—I do not know which forest it was, whether the Wenatchee or the Yakima; but one of them had a reclamation withdrawal, and that brought about complications with regard to the timber settlement that might be made there, and we were puzzled as to that. I think that it was the contention of the railway company that it should not be required to pay for the timber which under the stipulation it would have to cut from the right of way and the additional land it cleared in the Washington Reserve.

I heard about the conference that was held between Mr. Peck and Mr. Field on the one part and Judge Woodruff, then in the Interior Department, and some of the forestry officials, on the other part, in respect to the Washington controversy, but I am not sure who took part in it. I don't believe that I attended. My impression is that Mr. Clapp, my assistant, took part in one of the discussions; I am not sure. He was one of two assistants [**344**] that I had at that time in the forest service.

All I can state is that this remark which is said to have been made to Mr. Peck and Mr. Field was not

(Deposition of Wm. T. Cox.)

made by me, nor so far as I can remember, in my presence.

I believe that it is a fact, that it was the practice or rule of the forest service at that time in considering applications for rights of way for railroads, to treat forest lands under temporary withdrawal on the same basis as forests established by proclamation.

Redirect Examination by Mr. HENDERSON.

I believe that the right of way across the Washington National Forest which was under discussion at that time, passed through a reclamation withdrawal—through a part of a large reclamation withdrawal for reservoir purposes.

My recollection is not distinct as to Mr. Clapp's being present at an interview or conference with Judge Woodruff. I was not present at that conference.

Recross-examination by Mr. FIELD.

Answering a question as to whether Mr. Price was in Washington and about the forest office at the time Peck and Field were there—at this time that has been referred to—I have an impression that we took up some of these matters with Mr. Price, but whether he was present at that particular meeting I am not sure. I just mean during the course of negotiations, which may have been several months. **[345]**

Plaintiff's Exhibit No. 34 [Report on Timber Cut and to be Cut].

CHICAGO MILWAUKEE & ST. PAUL RY. CO.
COEUR D'ALENE NATIONAL FOREST.
Timber Trespass.

Report on timber cut and timber to be cut in clearing Right of way. Requested by LL. letter of Sept. 26, 1908.

The trespass areas mentioned in LL. letter of Sept. 26, 1908, are outside the three hundred foot strip and will be considered in a second report.

That portion of the right of way which passes through hood timber, namely, from the Idaho-Montana state line to the south line of Section 18, T. 46 N., R. 6 E., B. M., is cleared to an average width of 200 feet on the upper side of the center line and 100 feet on the lower or downhill side. The width of the clearing is irregular, however, and varies greatly from place to place along the line. The desired average width is exceeded in many places to provide for fills, cuts, protection to wooden bridges from fire, room for side tracks, etc. Over tunnels less than 100 feet in width is cleared. There is, of course, no need for more clearing over tunnels.

As far as the right of way passes through good timber, as described above, the clearing generally exceeds the width desired by the Forest Service, and the amount of timber as given in this report is in excess of the estimate in my report of Sept. 24, 1907, and is, of course, also in excess of the timber speci-

fied in the bill of complaint filed with the Attorney General.

No further clearing should be required on the right of way from the Idaho Montana state line to the south side of Section 18, T. 46 N., R 6 E., B. M.

The remainder of the right of way, namely, from the south line of Section 18 to the western boundary of the Forest, is not sufficiently cleared. The clearing averages in width only 100 feet above the center line and 100 feet below the center line, excepting where the clearing extends in many places from the center line down the [346] slope to the Creek, a distance varying from 100 to 300 feet.

The timber estimated in my report of Sept. 24th, 1907, for this part of the right of way, occurred usually as a strip along the creek. Thus, although the right of way below the south line of Section 18 is not sufficiently cleared, all the timber estimated has been cut.

An additional strip of 100 feet in width should be cleared along the upper side of the right of way, or to a distance of 200 feet from the center line, excepting over tunnels. This clearing will involve the cutting of no additional merchantable timber since the forest cover on this strip is brush and reproduction. The amount of timber given in this report then covers the amount of timber cut, and no more will be cut although additional clearing is required.

The area covered by the right of way clearing in Sec. 15, T. 45 N., R. 5 E., was included in the valid squatter claim of S. M. Williams, who died June 23, 1908, and as he has no heirs who can assert a valid

claim, the timber cut on this section, which was omitted from the former estimates, is included in this report.

Section 36, T. 46 N., R. 5 E., and Section 16, T. 45 N., R. 5 E., are State School lands, the plats of survey of which are not yet filed. Since the right of way is a trespass case the timber on these sections, separately designated, is included in this report.

This report is accompanied by maps showing the extent of the right of way clearing through each forty. I regret that it is not possible to prepare a map as a whole on one sheet. To draw the clearing to scale, 8 inches to the section was necessary, and as this on one sheet would make an unwieldy map, it was found necessary to make map sheets of one section each.

Respectfully submitted,

DORR SKEELS,
Forest Assistant.

Approved, January 6, 1909.
W. G. WEIGLE,
Forest Supervisor. [347]

[Schedule of Timber.]

1.

	Totals.
SECTION 26, TWP. 47 N., RANGE 6 E., B. M.	
SW.¼ SE.¼	
W. Pine	400 ft. B. M.
J. Pine.	1600
Spruce	18800
W. Fir.	7000
	27800 ft. B. M. . . . . 27800 ft. B. M.

		Totals.
SE.¼ SE.¼		
W. Pine	200 ft. B. M.	
J. Pine	800	
Spruce	9400	
W. Fir	3500	
	13900 ft. B. M.....	13900 ft. B. M.
SECTION 35, TWP. 47 N., RANGE 6 E., B. M.		
NW.¼ NW.¼		
W. Pine	94586 ft. B. M.	
Spruce	45000	
W. Fir	5499	
D. Fir	4875	
	149960 ft. B. M.....	149960
NE.¼ NW.¼		
W. Pine .. ..154250 ft. B. M.		
J. Pine	36000	
Spruce	75000	
D. Fir	800	
W. Fir..	8970	
Tam.	7580	
	282600 ft. B. M.....	282600
NW.¼ NE.¼		
W. Pine	2300 ft. B. M.	
J. Pine..	3000 ft. B. M.	
Spruce	1200	
D. Fir..	65	
W. Fir	145	
Tam.	180	
	6890 ft. B. M.....	6890

Totals.

SW.¼ NW.¼
W. Pine... ..277750 ft. B. M.
Spruce 132000
W. Fir.... .. 15950
D. Fir.. 14300

439000 ft. B. M..... 439000

920150 ft. B. M.

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2.

Forward from pg. 1..... 520150 ft. B. M.

NW.¼ SW.¼
W. Pine .. ..290395 ft. B. M.
Spruce 138000
W. Fir.. 16675
D. Fir.. 14950

460000 ft. B. M..... 460000

SW.¼ SW.¼
W. Pine ..... 91000 ft. B. M.
W. Fir.. 14000
J. Pine 6300
D. Fir 91000

202300 ft. B. M..... 202300

SECTION 2, TWP. 46 N.,
RANGE 6 E., B. M.
NW.¼ NW.¼
W. Pine .....164400 ft. B. M.
D. Fir 19200

		Totals.
W. Fir.... ..	21600	
Spruce	6600	
J. Pine.... ..	13800	
	225600 ft. B. M.....	225600
SW.¼ NW.¼		
W. Pine.. ...	28500 ft. B. M.	
D. Fir.... ...	23750	
J. Pine	35200	
Spruce	2250	
W. Fir..... ..	5000	
	94750 ft. B. M.....	94750
NW.¼ SW.¼		
J. Pine	17600 ft. B. M.	
W. Pine.. ...	8800	
D. Fir.... ...	5280	
W. Fir..	2640	
Spruce..	880	
	35100 ft. B. M.....	35100
NE.¼ SW.¼		
J. Pine	7200 ft. B. M.	
W. Pine.... .	900	
D. Fir	900	
	9000 ft. B. M.....	9000
		1546900 ft. B. M.

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		Totals.
	3.	
For'd from pg. 2.....		1546900 ft. B. M.
SE.¼ SW.¼		
J. Pine.... ..	3040 ft. B. M.	
W. Pine	380	
D. Fir..... ..	380	
	3800 ft. B. M.....	3800 ft. B. M.
NW.¼ SE.¼		
J. Pine.... ..	6800 ft. B. M.	
W. Pine	850	
D. Fir	850	
	8500 ft. B. M.....	8500
SW.¼ SE.¼		
J. Pine	4800 ft. B. M.	
W. Pine.. . . .	600	
D. Fir	600	
	6000 ft. B. M.....	6000
NE.¼ SE.¼		
J. Pine	9040 ft. B. M.	
W. Pine	1130	
D. Fir	1130	
	11300 ft. B. M.....	11300
SECTION 1, TWP. 46 N., RANGE 6 E., B. M.		
NW.¼ SW.¼		
J. Pine	8000 ft. B. M.....	8000
NE.¼ SW.¼		
J. Pine.... ..	6400 ft. B. M.....	6400

		Totals.
SE.¼ SW.¼		
J. Pine	54500 ft. B. M.	
D. Fir...	21500	
W. Pine	51350	
W. Fir..... ...	11500	
	138850 ft. B. M.....	138850
SECTION 12, TWP. 46 N., RANGE 6 E., B. M.		
NE.¼ NW.¼		
W. Pine	30054 ft. B. M.	
D. Fir	20952	
J. Pine.. ...	9130	
	60136 ft. B. M.....	60136
		1789886 ft. B. M.

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4.

For'd from page 3.....		1789886 ft. B. M.
SE.¼ NW.¼		
W. Pine... ..	43175 ft. B. M.	
D. Fir	51260	
	94435 ft. B. M.....	94435
SW.¼ NW.¼		
W. Pine..... ..	10480 ft. B. M.	
D. Fir..	10340	
Tam...	600	
	21420 ft. B. M.....	21420

461

Totals.

SW.¼ NE.¼
W. Pine .. ..131450 ft. B. M.
D. Fir.... ...158440

289890 ft. B. M..... 289890

SE.¼ NE.¼
W. Pine ..... 15700 ft. B. M.
D. Fir 18640

34340 ft. B. M..... 34340

NE.¼ SE.¼
W. Pine ..... 11160 ft. B. M.
D. Fir..... ..224100

235260 ft. B. M..... 235260

SE. ¼ SE. ¼
W. Pine ..... 52400 ft. B. M.
D. Fir 51700
Tam. 3000

107100 ft. B. M..... 107100

SW. ¼ SE. ¼
W. Pine.. ... 20960 ft. B. M.
D. Fir 20680
Tam. 1200

42840 ft. B. M..... 42840

Totals.

NW. ¼ SE. ¼
W. Pine ..... 64175 ft. B. M.
D. Fir 65680
Tam.. 3000

132855 ft. B. M.....132855

2748026 ft. B. M.

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5.

For'd from page4.. .....2748026 ft. B. M.

NE. ¼ SW. ¼
W. Pine .. .. 47160 ft. B. M.
D. Fir 46530
Tam. 2700

96390 ft. B. M..... 96390

NW. ¼ SW. ¼
W. Pine .. ... 36680 ft. B. M.
D. Fir 36190
Tam. 2100

74970 ft. B. M.....74970

SECTION 7, TWP. 46 N.,
RANGE 7 E., B. M.

NW. ¼ SW. ¼
W. Pine ..... 3000 ft. B. M.
D. Fir 60000

63000 ft. B. M..... 63000

Totals.

SW. ¼ SW. ¼
W. Pine .. .... 9500 ft. B. M.
D. Fir 186000

195500 ft. B. M..... 195500

SE. ¼ SW. ¼
W. Pine .. .. 1500 ft. B. M.
D. Fir.. 5000
Cedar 3000

9500 ft. B. M..... 9500

SW. ¼ SE. ¼
Old burn,—no timber
SE. ¼ SE. ¼
Cedar ... .15000 ft. B. M..... 15000

SECTION 18, TWP. 46 N.,
RANGE 7 E., B. M.

NE. ¼ NE. ¼
Cedar .. ..10000 ft. B. M.
(old burn
(no green timber.. 10000

NW. ¼ NE. ¼
W. Pine ..... 31295 ft. B. M.
D. Fir.. 7705
Tam. 16005
W. Fir.. 8855
Cedar 23155

87015 ft. B. M..... 87015

3299401 ft. B. M.

Totals.

6.

For'd from pg. 5.....3289401 ft. B. M.

NE. ¼ NW. ¼

W. Pine .. .. 27000 ft. B. M.
D. Fir.. 6700
Tam..... 13800
W. Fir 7600
Cedar 20000

75100 ft. B. M..... 75100

NW. ¼ NW. ¼

W. Pine ..... 33200 ft. B. M.
D. Fir 9500
Tam. 9000
W. Fir 25000
Cedar 114300
Spruce 14500

205500 ft. B. M.... 205500

SECTION 17, TWP. 46 N.,
RANGE 7 E., B. M.

NW. ¼ NW. ¼—old burn—no timber.

SECTION 13, TWP. 46 N.,
RANGE 6 E., B. M.

NE. ¼ NE. ¼

W. Pine ..... 1600 ft. B. M.
D. Fir 6620
Cedar 9260
W. Fir 1600
Spruce 4000

23080 ft. B. M..... 23080

Totals.

SECTION 11, TWP. 46 N.,
RANGE 6 E., B. M.

NE. ¼ SE. ¼
W. Pine .. .. 32570 ft. B. M.
D. Fir 7520

40090 ft. B. M..... 40090

SE. ¼ NE. ¼
W. Pine .....160000 ft. B. M.
D. Fir 37000

197000 ft. B. M..... 197000

NE. ¼ NE. ¼
W. Pine ..... 22400 ft. B. M.
D. Fir 5200

27600 ft. B. M..... 27600

3857771 ft. B. M.

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7.

For'd from page 6.....3857771 ft. B. M.

NW. ¼ NE. ¼
W. Pine ..... 76000 ft. B. M.
D. Fir 18000

94000 ft. B. M..... 94000

SW. ¼ NE. ¼
W. Pine ..... 66200 ft. B. M.
D. Fir 15000

81200 ft. B. M..... 81200

		Totals.
SE. ¼ NW. ¼		
W. Pine	61080 ft. B. M.	
D. Fir	14100	
	75180 ft. B. M.....	75180
NE. ¼ SW. ¼		
W. Pine	81440 ft. B. M.	
D. Fir	18800	
	100240 ft. B. M.....	100240
NW. ¼ SW. ¼		
W. Pine .....101800 ft. B. M.		
	23500	
	125300 ft. B. M.....	125300
SECTION 10, TWP. 46 N., RANGE 6 E., B. M.		
NE. ¼ SE. ¼		
W. Pine .....260000 ft. B. M.		
D. Fir	23500	
Spruce	15000	
W. Fir	43000	
	341500 ft. B. M.....	341500
NW. ¼ SE. ¼		
W. Pine	26000 ft. B. M.	
D. Fir	2350	
Spruce	1500	
W. Fir	4300	
	34150 ft. B. M.....	34150

Totals.

SW. ¼ NE. ¼
W. Pine .....286000 ft. B. M.
D. Fir 25850
Spruce 16500
W. Fir 47300

375650 ft. B. M..... 375650

5084991 ft. B. M.

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8.

For'd from page 7.....5084991 ft. B. M.

NW. ¼ NE. ¼
W. Pine ..... 65000 ft. B. M.
D. Fir 5900
Spruce 3800
W. Fir 10750

85450 ft. B. M..... 85450

NE. ¼ NW. ¼
W. Pine .....135000 ft. B. M.
D. Fir 43250
Spruce 7500
W. Fir 22200
Tam. 20000

227950 ft. B. M..... 227950

NW. ¼ NW. ¼
W. Pine ..... 5460 ft. B. M.
D. Fir 33600
Tam. 21450
W. Fir 750

61260 ft. B. M..... 61260

		Totals.
SECTION 3, TWP. 46 N., RANGE 6 E., B. M.		
SE. ¼ SW. ¼		
None		
SW. ¼ SW. ¼		
W. Pine	2175 ft. B. M.	
D. Fir	13455	
Tam.	8580	
W. Fir	300	
	24510 ft. B. M.....	24510
SECTION 4, TWP. 46 N., RANGE 6 E., B. M.		
SE. ¼ SE. ¼		
W. Pine	7040 ft. B. M.	
D. Fir	2860	
Tam.	5170	
W. Fir	1100	
	16170 ft. B. M.....	16170
SW. ¼ SE. ¼		
W. Pine	9000 ft. B. M.	
D. Fir	33000	
Tam.	45000	
	87000 ft. B. M.....	87000
		5587331 ft. B. M.

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Totals.

9.

For'd from page 8.....5587331 ft. B. M.

SE. ¼ SW. ¼
W. Pine .....184500 ft. B. M.
D. Fir 44100
10500

239100 ft. B. M..... 239100

SW. ¼ SW. ¼
W. Pine .....175000 ft. B. M.
D. Fir 42000
W. Fir 10000

227000 ft. B. M..... 227000

SECTION 5, TWP. 46 N.,
RANGE 6 E., B. M.
SE. ¼ SE. ¼
W. Pine .....148750 ft. B. M.
W. Fir 8500
D. Fir 35700

192950 ft. B. M..... 192950

SECTION 8, TWP. 46 N.,
RANGE 6 E., B. M.
NE. ¼ NE. ¼
W. Pine ..... 17500 ft. B. M.
D. Fir 4200
W. Fir 1000

22700 ft. B. M..... 22700

Totals.

NW. ¼ NE. ¼
W. Pine .....148750 ft. B. M.
W. Fir 8500
D. Fir 35700

192950 ft. B. M..... 192950

NE. ¼ NW. ¼
W. Pine .....175000 ft. B. M.
D. Fir 42000
W. Fir..... 10000

227000 ft. B. M..... 227000

NW. ¼ NW. ¼
W. Pine .....138000 ft. B. M.
D. Fir 33200
W. Fir 7900

179100 ft. B. M..... 179100

6675181 ft. B. M.

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10.

For'd from page 9.....6675181 ft. B. M.

SW.¼ NW.¼
W. Pine ..... 35000 ft. B. M.
D. Fir 8400
W. Fir.. 2000

45400 ft. B. M..... 45400

		Totals.
SECTION 7, TWP. 46 N., RANGE 6 E., B. M.		
SE.¼ NE.¼		
W. Pine	35000 ft. B. M.	
D. Fir	9500	
W. Fir	2000	
	46500 ft. B. M.....	46500
NE.¼ SE.¼		
D. Fir	1600 ft. B. M.....	1600
NW.¼ SE.¼		
D. Fir	600 ft. B. M.....	600
SW.¼ SE.¼		
D. Fir	1500 ft. B. M.....	1500
SE.¼ SW.¼		
No saw timber.		
SECTION 18, TWP. 46 N., RANGE 6 E., B. M.		
NE.¼ NW.¼—no saw timber.		
NW.¼ NW.¼—no saw timber.		
SW.¼ NW.¼—no timber.		
NW.¼ SW.¼—no timber.		
SW.¼ SW.¼—no timber.		
SECTION 13, TWP. 46 N., RANGE 5 E., B. M.		
SE.¼ SE.¼—no timber.		
SECTION 24, TWP. 46 N., RANGE 5 E., B. M.		
NE. ¼ NE. ¼—no timber.		
		6770781 ft. B. M.

Totals.

11.

For'd from page 10.....6770781 ft. B. M.

SE.¼ NE.¼—no timber.

SW.¼ NE.¼—no timber.

NW.¼ SE.¼—no timber.

SW.¼ SE.¼—no timber.

SECTION 25, TWP. 46 N.,
RANGE 5 E., B. M.

NW.¼ NE.¼

W. Pine	451 ft. B. M.	
D. Fir	1429	
Tam.	1395	
Cedar	151	
	3426 ft. B. M.....	3426

NE.¼ NW.¼

W. Pine	451	
D. Fir	1429	
Tam.	1396	
Cedar	150	
	3426 ft. B. M.....	3426

SW.¼ NE.¼

W. Pine	987 ft. B. M.	
D. Fir	2654	
Tam.	2592	
Cedar	280	
	6513 ft. B. M.....	6513

		Totals.
NW.¼ SE.¼		
W. Pine	451 ft. B. M.	
D. Fir	1429	
Tam.	1396	
Cedar	150	
	3426 ft. B. M.....	3426
NE. ¼ SW. ¼		
W. Pine	968 ft. B. M.	
D. Fir	3064	
Tam.	2992	
Cedar	322	
	7346 ft. B. M.....	7346
NW. ¼ SW.¼		
W. Pine	65	
D. Fir	200	
Tam.	200	
Cedar	22	
	487 ft. B. M.....	487
		6795405 ft. B. M.

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12.

For'd from page 10.....6795405 ft. B. M.

SW. ¼ SW.¼		
W. Pine	1096 ft. B. M.	
D. Fir	3471	
Tam.	3389	
Cedar	365	
	8321 ft. B. M.....	8321

		Totals.
SECTION 9, TWP. 46 N., RANGE 6 E., B. M.		
NE. ¼ NE. ¼		
W. Pine	193290 ft. B. M.	
D. Fir	4930	
W. Fir	80750	
	278970 ft. B. M.....	278970
NE. ¼ NE. ¼		
W. Pine	2000 ft. B. M.	
D. Fir	6000	
Tam.	4200	
Cedar	650	
	12850 ft. B. M.....	12850
SECTION 1, TWP. 45 N., RANGE 5 E., B. M.		
NW. ¼ NW. ¼		
W. Pine	710 ft. B. M.	
D. Fir	1775	
Tam.	1775	
Cedar	2841	
	7101 ft. B. M.....	7101
SW. ¼ NW. ¼		
W. Pine	659 ft. B. M.	
D. Fir	1648	
Tam.	1648	
Cedar	2638	
	6593 ft. B. M.....	6593

Totals.

NW. ¼ SW. ¼
W. Pine ..... 608 ft. B. M.
D. Fir 1520
Tam. 1520
Cedar 2434

6082 ft. B. M..... 6082

7115322 ft. B. M.

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13.

For'd from page 12.....7115322 ft. B. M.

SW. ¼ SW. ¼
W. Pine ..... 812 ft. B. M.
D. Fir 2030
Tam. 2030
Cedar 3247

8119 ft. B. M..... 8119

SECTION 12, TWP. 45 N.,
RANGE 5 E., B. M.
NW. ¼ NW. ¼
W. Pine ..... 881 ft. B. M.
D. Fir 2014
Tam. 1893
Cedar 3949
W. Fir 60

8797 ft. B. M..... 8797

		Totals.
SECTION 11, TWP. 45 N., RANGE 5 E., B. M.		
NE. ¼ NE. ¼		
W. Pine	1160 ft. B. M.	
D. Fir	2321	
Tam.	1945	
W. Fir	188	
Cedar	5990	
	11604 ft. B. M.....	11604
NW. ¼ NE. ¼		
W. Pine	1160 ft. B. M.	
D. Fir	2321	
Tam.	1945	
W. Fir	188	
Cedar	5990	
	11604 ft. B. M.....	11604
NE. ¼ NW. ¼		
W. Pine	580 ft. B. M.	
D. Fir	1160	
Tam.	972	
W. Fir	94	
Cedar	2995	
	5801 ft. B. M.....	5801
SE. ¼ NW. ¼		
W. Pine	1160 ft. B. M.	
D. Fir	2321	
Tam.	1945	
W. Fir	188	

Totals.

Cedar 5990

11604.....11604

7172851 ft. B. M.

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14.

For'd from page 13..... 7172851 ft. B. M.

NE. ¼ SW. ¼

W. Pine ..... 580 ft. B. M.
D. Fir 1160
Tam. 972
W. Fir. 94
Cedar 2995

5801 ft. B. M..... 5801

NW. ¼ SW. ¼

W. Pine ..... 1160 ft. B. M.
D. Fir 2321
Tam. 1945
W. Fir 188
Cedar 5990

11604 ft. B. M..... 11604

SECTION 10, TWP. 45 N.,
RANGE 5 E., B. M.

SE. ¼ SE. ¼

W. Pine ..... 1160 ft. B. M.
D. Fir 2321
Tam. 1945

	Totals.
W. Fir 188	
Cedar 6000	
11614 ft. B. M.....	11614

For'd to pg. 15.... 6201870 ft. B. M.

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15.

For'd from page 14.... 7801870 ft. B. M.

SECTION 15, TWP. 45 N.,
RANGE 5 E. B. M.

N.½ N.½—estimate—mixed species. 250000
(Ced., W. P., W. F., D. F., Tam., etc.)
Valid squatter claim S. M. Williams,
deceased June 23, 1908—no heirs.

SECTION 17, TWP. 45 N.,
RANGE 5 E. B. M.

NE. ¼ NE. ¼	mixed	species	scaled	70230
NW. ¼ NE. ¼	"	"	"	20000
SW. ¼ NE. ¼	"	"	"	60000
SE. ¼ NW. ¼	"	"	"	75000
SW. ¼ NW. ¼	"	"	"	70000
NW. ¼ NW. ¼	"	"	"	9000

SECTION 12, TWP. 45 N.,
RANGE 4 E., B. M.

SE. ¼ SE. ¼	mixed	species	scaled	25500
SW. ¼ SE. ¼	"	"	"	25950
SE. ¼ SW. ¼ ..	"	"	"	25500
SW. ¼ SW. ¼	"	"	"	25000

SECTION 18, TWP. 45 N.,
RANGE 5 E., B. M.

NW. ¼ NE. ¼—mixed species—scaled 34580

Totals.

SECTION 7, TWP. 45 N.,
RANGE 5 E., B. M.

NE. ¼ SE. ¼	mixed	species	scaled	50000
SE. ¼ SE. ¼	"	"	"	54000
NW. ¼ SE. ¼	"	"	"	55000
NE. ¼ SW. ¼	"	"	"	5000
SE. ¼ SW. ¼	"	"	"	50650
SW. ¼ SW. ¼	"	"	"	50000

8757280 ft. B. M.

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16.

SECTION (School) No. 36,
TWP. 46 N., RANGE 5 E., B. M.

NW. ¼ NW. ¼

W. Pine	1000 ft. B. M.
D. Fir	3000
Tam.	2000
	300
6300 ft. B.M.	6300 ft. B. M.

SW. ¼ NW. ¼

W. Pine	4500
D. Fir	14250
Tam.	9750
Cedar	1500
30000 ft. B. M.	30000

NW. ¼ SW. ¼—no timber.
SW. ¼ SW. ¼—no timber..... 36300 ft. B. M.

Totals.

SECTION (School) No. 16,
TWP. 45 N., RANGE 5 E., B. M.
N. ½ NW. ¼ 200000
Estimate—mixed species.
N. ½ NE. ¼—valid squatter claim
of Lee Setser.

Total of School Lands.....236300 ft. B. M.

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17.

TOTALS.

Total Government lands.....8757280 ft. B. M.
Total School lands, pg. 16..... 236300

Grand total.....8993580 ft. B. M.

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Plaintiff's Exhibit 35—Estimate of Timber Killed by Fire on the Chicago, Milwaukee and St. Paul Railway Extension thru the Coeur d'Alene National Forest, Idaho.

1/Original.

Unsurveyed Land.

Standing Timber Killed by Fire, 1908.

1 to 10 yrs. old.

SECTION 8, TOWNSHIP 46 N., RANGE 7 E., B. M.

Description.	W. Pine. Trees.	W. Pine. Ft. M.	Red Fir. Trees.	Red Fir. Ft. M.	W. Fir. Trees.	W. Fir. Ft. M.	Tamarack. Trees.	Tamarack. Ft. M.	Cedar. Trees.	Cedar. Ft. M.	Hemlock. Trees.	Hemlock. Ft. M.	Jack Pine. Trees.	Jack Pine. Ft. M.	Total Trees.	Total Feet. M.	Acreage.	Seedlings Per Acre.	Adaptation.
SW. SW.	8	5	32	20	14	10	9	5							63	40	25	200	Tie timber
SE.	40	40	50	45			20	16.4							110	101.4	20	400	" "
NW.	23	18.5	12	10.7	10	7.5			16	5.2					61	41.9	20	300	saw "
NE.	5	5.	10	8.											15	13.	35	200	tie "
SE. NW.	33	33.	61	36.6	8	5			34	13.6					136	88.2	20	400	saw "
NW.	75	60.	80	100	50	35	400	225			50	35.	200	50	855	505	38	400	saw "
SW. SE.	15	15	32	32			50	30							97	77	7	500	saw "
NW.			15	12			10	10							25	22	20	400	saw "
NE.	24	25	42	25.2			50	25							116	75.2	20	500	saw "
SE. NE.			4	2.8			30	20							34	22.8	30	400	saw "
NE.																	8	300	
Totals,	223	201.5	338	292.3	82	57.5	569	331.4	50	18.8	50	35	200	50	1512	986.5	243		
NW. SW. & SE. NW. Down Merchantable Timber Burnt in Creek and Canyon															140	75			

SECTION 9, TOWNSHIP 46 N., RANGE 7 E. B. M.

SW. NW.							5	3.5							5	3.5	40	200	tie "
SE. "			63	31.5							22	11			85	42.5	40	400	" "
Totals, Ford.																			

DANIEL F. SEEREY,
Lumberman.

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PLAINTIFF'S EXHIBIT 35—RECAPITULATION OF ESTIMATES BY SECTIONS OF TIMBER KILLED BY FIRE ON THE CHICAGO, MILWAUKEE & ST. PAUL R. R. EXTENSION THRU THE COEUR D'ALENE NATIONAL FOREST, IDAHO.

2/Original.

Standing Timber Killed by Fire, 1908.
Unsurveyed Land.

Section.	Twp.	R.	W. Pine. Trees.	W. Pine. Feet.	Red Fir. Trees.	Red Fir. Feet.	White Fir. Trees.	White Fir. Feet.	Tamarack. Trees.	Tamarack. Feet.	Cedar. Trees.	Cedar. Feet.	Hemlock. Trees.	Hemlock. Ft.	Jack Pine. Trees	Jack Pine. Feet.	Total Trees.	Total Ft. B. M.	Acreage.	Total Seedlings.
Ford.			2792	1078.5	2522	10461	257	159.5	1634	799.5	769	243.1	177	68	1000	220	9416	3759.7	1254	635,700
7	46	N.6E																	23	8,200
25	"	5E	35	20	150	60			50	20	5						285	105	60	12,000
35	47	6E	60	18	10	2											70	20	1	400
2	46	—	250	100	100	35	80	24							60	2	490	161	6½	2,600
			3137	1216.5	2782	1143.1	337	183.5	1684	819.5	819	248.1	177	68	1060	222	10261	4045.7	1344½	658,900

Values.

4.045.700 ft. B. M. at $4.00 per M.....$16,182.80
1344½ acres mixed seedlings at $10.00 per acre..... 13,445.00

$29,627.80

Wallace, Idaho, Oct. 12, '08.

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PLAINTIFF'S EXHIBIT 35—RECAPITULATION OF ESTIMATES BY SECTIONS OF TIMBER KILLED BY FIRE ON THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY EXTENSION THRU THE COEUR D'ALENE NATIONAL FOREST IDAHO.

1/Original.

Standing Timber Killed by Fire, 1908.

Unsurveyed Land.

Section.	Twp.	Rg.	W. Pine. Trees.	W. Pine. Feet. M.	Red Fir. Trees.	Red Fir. Feet. M.	W. Fir. Trees.	W. Fir. Feet. M.	Tamarack. Trees.	Tamarack. Feet. M.	Cedar. Trees.	Cedar. Feet. M.	Hemlock. Trees.	Hemlock. Feet. M.	Jack Pine. Trees.	Jack Pine. Feet. M.	Total Trees. B. M.	Total Feet M.	Acreage.	Seedlings.
7	46N.	7E.	352	264.	1544	553.3	100	70	726	354.	416	133.3			400	75.	3538	1,449.6	501	327,000
																	125	70.		
			Down Merchantable Timber Burnt.																	
8	—	—	223	201.5	338	292.3	82	57.5	569.	331.4	50	18.8	50	35	200	50	1512	986.5	243	88,900
																	140	75		
			Down Mercantable Timber Burndt.																	
																	90	46	126	37,800
9	—	—			63	31.5			5	3.5			22	11						
															300	75	1050	300	55	55,000
6	—	—	750	225									100	20	100	20	410	110	25	25,000
5	—	—	40	20	60	20	30	10	80	20							473	209.6	75	21.500
18	—	—	32	40	17	10	45	22	71	44.6	303	91	5	2						
					Surveyed Land															
																	240	72	30	6,000
13	—	6E	100	20	90	27			50	25									4	1,200
12	—	—															533	161	39	19,500
11	—	—	320	98	205	62			8	1							250	60	19	9,000
10	—	—	225	55					25	5							480	90	23	11,300
4	—	—	350	70	30	5			100	15									1	200
5	—	—															575	130	113	33,300
8	—	—	400	85	175	45														
			2792	1078.5	2522	1046.1	257	159.5	1634	789.5	769	243.1	177	68	1000	220	9416	3759.7	1254	635,700

Ford.
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PLAINTIFF'S EXHIBIT 35—ESTIMATE OF TIMBER KILLED BY FIRE ON THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY EXTENSION THRU THE COEUR D'ALENE NATIONAL FOREST, IDAHO.

2/Original.

Unsurveyed Land.

Standing Timber Killed by Fire, 1908.

SECTION 9, TOWNSHIP 46 N., RANGE 7 E., B. M.

Description.	W. Pine. Trees.	W. Pine. Ft. M.	Red Fir. Trees.	Red Fir. Ft. M.	W. Fir. Trees.	W. Fir. Ft. M.	Tamarack. Trees.	Tamarack. Ft. M.	Cedar. Trees.	Cedar. Ft. M.	Hemlock. Trees.	Hemlock. Ft. M.	Jack Pine. Trees.	Jack Pine. Ft. M.	Total Trees.	Total Feet. M.	Acreage.	1 to 10 yrs old Seedlings. Per Acre.	Adaptation.
Bt. For'd.			63	31.5			5	3.5			22	11			90	46.	80		
S.½ NW.—NW. & S.½ NE.—NW.																	46	300	
Total			63	31.5			5	3.5			22	11			90	46	126		
SECTION 7, TOWNSHIP 46 N., RANGE 7 E., B. M.																			
NE. NE.	100	50	500	150	35	25.	250	75.					400	75.	1250	350	40	1000	Tie Timber
NW. —	120	100	96	75	35	25	250	150	150	50					651	400	30	1000	Tie —
SE. —			32	30			30	20							62	50	40	1200	— —
SW. —	45	40	60	50	50	35	85	20	160	48.					340	193	40	1200	— —
NE. NW.	60	50	30	21	15	10			10	5.					115	86	25	1000	— —
SE. —		8	5				5	4	10	4.					23	13	40	500	— —
SW. —	22	20	10	5			20	15							52	40	16	500	— —
NE. SW.			140	70			50	25	31	9.3					221	104.3	40	400	— —
NW. —			500	75			20	10							520	85	20	400	— —
SE. —	5	4.	8	4.8					50	15					63	23.8	30	200	— —
SW.			20	5			15	5.							35	10	20	200	— —
Ford.	352	263	1404	490.8	100	70.	665	324.	411	131.3			400	75	3332	1355.1	341		

DANIEL SEEREY,
Lumberman.

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PLAINTIFF'S EXHIBIT 35—ESTIMATE OF TIMBER KILLED BY FIRE ON THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY EXTENSION THRU THE COEUR D'ALENE NATIONAL FOREST, IDAHO.

3/Original. Unsurveyed Land.

Standing Timber Killed by Fire, 1908.

SECTION 7, TOWNSHIP 46 N., RANGE 7 E., B. M.

Description.	W. Pine. Trees.	W. Pine. Ft. M.	R. Pine. Trees.	R. Pine. Ft. M.	W. Fir. Trees.	W. Fir. Ft. M.	Tamarack. Trees.	Tamarack. Ft. M.	Cedar. Trees.	Cedar. Ft. M.	Hemlock. Trees.	Hemlock. Ft. M.	Jack Pine. Trees.	Jack Pine. Ft. M.	Total Trees.	Total Feet. M.	Acreage.	Seedlings.	Adaptation.
Ford.	352	264	1404	490.8	100	70	665	324	411	131.3			400	75	3332	1,355.1	341		
NE. SE.			15	5											15	5	40	500	Tie Timber
NW. —			40	20			30	10							70	30	40	500	— —
SE. —			35	17.5			11	10	5	2					51	29.5	40	400	— —
SW. —			50	20			20	10							70	30	40	400	— —
Totals	352	264	1544	553.3	100	70	726	354	416	133.3			400	75	3538	1449.6	501	—	— —
NW.—NE. NE.—NW.—SE.—NW. Down Merchantable Timber Burnt in Creek & Canyon															125	70			
SECTION 6, TOWNSHIP 46 N., RANGE 7 E., B. M.																			
SE. SE.	500	150											200	50	700	200	30	1000	Ties —
SW. SE.	250	75											100	25	350	100	25	1000	—
Totals,	750	225											300	75	1050	300	55		
SECTION 5, TOWNSHIP 46 N., RANGE 7 E., B. M.																			
SW. SW.	40	20	60	20			30	10	20		100	20	100	20	410	110	25	1000	Ties

DANIEL F. SEEREY,
Lumberman.

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PLAINTIFF'S EXHIBIT 35—ESTIMATE OF TIMBER KILLED BY FIRE ON THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY EXTENSION THRU THE COEUR D'ALENE NATIONAL FOREST, IDAHO.

4/Original.

Unsurveyed Land.

Standing Timber Killed by Fire, 1908.

SECTION 18, TOWNSHIP 46 N., RANGE 7 E., B. M.

Description.	W. Pine. Trees.	W. Pine. Ft. M.	Red Fir. Trees.	Red Fir. Ft. M.	W. Fir. Trees.	W. Fir. Ft. M.	Tamarack. Trees.	Tamarack. Ft. M.	Cedar. Trees.	Cedar. Ft. M.	Hemlock. Trees.	Hemlock. Ft. M.	Jack Pine. Trees.	Jack Pine. Ft. M.	Total Trees.	Total Feet. M.	Acreage.	1 to 10 yrs old Seedlings. Per Acre.	Adaptation.
NE. NW.	7	7	8	5	15	7	36	20	70	21					136	60	25	300	Ties
			Spruce																
NW. NE.	18	25	4	2	20	10	28	19.6	103	31					173	87.6	20	300	Ties
											Spruce								
NE. — NW. NW.	7	8	5	3	10	5	7	5	130	39	5	2			164	62	20	300	—
Totals,	32	40	17	10	45	22	71	44.6	303	91	5	2			473	209.6	10	200	
																	75		

Surveyed Land.

SECTION 13, TOWNSHIP 46 N., RANGE 6 E., B. M.

NE. NE.	100	20	90	27			50	25							240	72	30	200	Ties

SECTION 12, TOWNSHIP 46 N., RANGE 6 E., B. M.

SECTION 11, TOWNSHIP 46, N., R. 6 E., B. M.

SE. SE.																	4	300	
SE. NE.	25	18	40	12											65	30	10	500	Ties
NE. — SW.	100	20	50	10			8	1							158	31	7	500	
SE. NW.	50	10	25	5											75	15	6	500	Ties
NE. SW.	45	20	40	20											85	40	5	500	Ties
NW. SW.	100	30	50	15											150	45	3	500	Ties.
Totals,	320	98	205	62			8	1							533	161	8	500	
																	39		

DANIEL SEEREY,
Lumberman.

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PLAINTIFF'S EXHIBIT 35—ESTIMATE OF TIMBER KILLED BY FIRE ON THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY EXTENSION THRU THE COEUR D'ALENE NATIONAL FOREST, IDAHO.

5/Original.

Surveyed Land.
Standing Timber Killed by Fire, 1908.
SECTION 10, TOWNSHIP 46 N., RANGE 6 E., B. M.

Description.	W. Pine. Trees.	W. Pine. Ft. M.	Red Fir. Trees.	Red Fir. Ft. M.	W. Fir. Trees.	W. Fir. Ft. M.	Tamarack. Trees.	Tamarack. Ft. M.	Cedar. Trees.	Cedar. Ft. M.	Hemlock. Trees.	Hemlock. Ft. M.	Jack Pine. Trees.	Jack Pine. Ft. M.	Total Trees.	Feet. M.	Acreage.	1 to 10 yrs. old Seedlings. Per Acre.	Adaptation.
NE. SE.	125	30.													125	30	5	400	Ties
SW. NE.	50	15													50	15	4	500	—
NE. NW.	50	10					25	5.							75	15	10	500	—
Total,	225	55					25	5.							250	60	19		
SECTION 4, TOWNSHIP 46 N., R. 6 E., B. M.																			
SE. SE.																	5	500	
SW. SE. (Spar Hill Lode Claim)																	6	500	
SE. SW.	50	10	30	5.											80	15	2	400	Ties
SW. —	300	60					100	15.			Gold Hill Lode Claim				400	75	10	500	—
Total	350	70	30	5			100	15							480	90	23		
SECTION 5, TOWNSHIP 46 N., RANGE 6 E., B. M.																			
SE. SE.																	1	200	
SECTION 8, TOWNSHIP 46 N., RANGE 6 E., B. M.																			
NW. NE.	100	20													100	20	6	200	Ties
NE. NW.	100	20	50	15.											150	35	40	300	Ties
NW. —	100	25	25	10											125	35	27	300	Ties
SW. —	100	20	100	20.											200	40	40	300	Ties
Total,	400	85	175	45.											575	130	113	—	

DANIEL F. SEEREY,
Lumberman.

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PLAINTIFF'S EXHIBIT 35—ESTIMATE OF TIMBER KILLED BY FIRE ON THE CHICAGO, MILWAUKEE RAILWAY EXTENSION THRU THE COEUR D'ALENE NATIONAL FOREST, IDAHO.

6/Original. Surveyed Land.

Standing Timber Killed by Fire, 1908.

SECTION 7, TOWNSHIP 46 N., RANGE 6 E., B. M.

Description.	W. Pine. Trees.	W. Pine. Ft. M.	Red Fir. Trees.	Red Fir. Ft. M.	W. Fir. Trees.	W. Fir. Ft. M.	Tamarack. Trees.	Tamarack. Ft. M.	Cedar. Trees.	Cedar. Ft. M.	Hemlock. Trees.	Hemlock. Ft. M.	Jack Pine. Trees.	Jack Pine. Ft. M.	Total Trees.	Total Feet. M.	Acreage.	1 to 10 yrs old Seedlings. Per Acre.	Adaptation.
																	5	400	
SE. NE.																	15	400	
NE. SE.																	3	400	
SW.																	23		
Total,																			
	SECTION 25, TOWNSHIP 46 N., RANGE 5 E., B. M.																		
S.½ SW.¼	35	20	150	60			50	20	50	5.					285	105	60	200	Ties
—	SECTION 35, TOWNSHIP 47 N., RANGE 6 E., B. M.																		
SW.¼	60	18	10	2											70	20	1	400	Ties
	SECTION 2, TOWNSHIP 46 N., RANGE 6 E., B. M.																		
NW.¼	250	100	100	35			80	24					60	2	490	161	6½	400	Ties

DANIEL F. SEEREY,
Lumberman.

Wallace, Idaho, October 12, '08.

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February 27, 1909.

ST.

Coeur d'Alene Fire Trespass.
C. M. St. P. Ry. Co. August 21, 1908.

Mr. A. E. Griffin,
c/o Stewart & Welch,
Iron Mountain, Montana.

Dear Sir:

In accordance with your request while in the office yesterday, I am enclosing a copy of Lumberman Seerey's report on the fires which occurred along the C. M. & St. P. Railway on the Coeur d'Alene National Forest last summer.

Very truly yours,

D. T. MASON,
Acting Chief of Silviculture.

Enclosure. E. H. [373]

Defendant's Exhibit "AA"—Cost of Timber Purch

	Subdivision.	Sec.	T.	R.	M. Feet.	White Pine. Logs to M.	Logs to Tree.	M.
Trout Creek.	NW.¼	28	46	2E	190			
	NE.¼	28	46	2E	425			
	SW.¼	32	46	2E	30			
	S.½ NE.	32	46	2E	142			
	SE.¼	32	46	2E	40			
Mica Creek.	NE.¼	31	45	2E	5175			
	SW.¼	31	45	2E	5885			
	NW.—NE.	32	45	2E				
	NE.—NW.							
	NW.—NW.							
	SW.—NW.				3150			
	S.½—NE.	32	45	2E				
	SE.—NW.							
	SW.—NW.	33	45	2E	5100			
	NE.—NE.	32	45	2E				
	NW.—NW.	33	45	2E	1150			
	SW.¼	32	45	2E	5400			
	N.½—SE.	32	45	2E				
	SW.—SE.	32	45	2E				
	NW.—SW.	33	45	2E	5200			
	SE.—SE.	32	45	2E				
	NE.—SW.	33	45	2E				
	S.½—SW.	33	45	2E	3050			
	NW.—NE.	33	45	2E				
	NW.—SE.	33	45	2E				
	S.½—NE.	33	45	2E	1385			
	NE.—NE.	33	45	2E				
	S.½—SE.	28	45	2E				
	NE.—SE.	28	45	2E	2090			
	E.½—NW.	28	45	2E				
	SW.—NW.	28	45	2E				
	NE.—SW.	28	45	2E	2175			
	SE—NE.	28	45	2E				
	W.½—NE.	28	45	2E				
	NW.—SE.	28	45	2E	3200			
	NE.—NE.	28	45	2E				
	NW.—NW.	27	45	2E				
	W.½—SW.	22	45	2E	1595			
	NW.—NE.	27	45	2E				
	E.½—NW.	27	45	2E				
	SW.—NW.	27	45	2E	775			
	SW.—NE.	22	45	2E				
	E.½—NW.	22	45	2E				
	SW.—NW.	22	45	2E	975			
Total					47132			
Marble Creek.	SW.—NE.	24	45	3E				
	SE.—NW.	24	45	3E				
	E.½—SW.	24	45	3E	245			
	E.½ of	20	45	4E				
	S.½—NW.	20	45	4E				
	N.½—SW.	20	45	4E				
	S.½—NW.	30	45	4E	950			
	E.½—SW.	30	45	4E				
	N.½—N.½	32	45	4E				
Total								
Total					48327			

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by Milwaukee Land Company in 1906 and 1907 on Following Creeks

Yellow Pine.			Red Fir.			Tamarack.			Cedar.			Spr
gs to M.	Logs to Tree.	M. Feet.	Logs to M.	Logs to Tree.	M. Feet.	Logs to M.	Logs to Tree.	M. Feet.	Logs to M.	Logs to Tree.	M. Feet.	Logs to M.
		415			200							
		375			125							
		260			594			85				
		90			613							
		45			552			25				
		675			400			100				
		845			1215			380				
		875			850			70				
		650			525			40				
		135			325							
		450			675			80			60	
		325			675			35			25	
		135			850			20			40	
		245			705			45				
		190			940						10	
		635			100			15				
		810			480			15			15	
		525			975							
		380			370			225				
		360			895			80				
		25			80			50				
		645			575			35			5	

rom Sundry Individuals, Tributary to Upper St. Joe River.

Logs o Tree.	M. Feet.	White Fir. Logs to M.	White Fir. Logs to Tree.	Total M. Feet	Cedar Ties Poles B. M.	Acreage. B. M.	Price.	Voucher Number.	Cruiser Price per M.
	50			865			1100.		1.28
	85			1010			1350.		1.34
	133			1137			1600		1.40
	175			1193	57	116	2500.		2.09
	106			873	19	76	1600.		1.83
				5078			8150.		1.605
	335			6460	110		4819.13		.75
				9037	370		14557.86		1.60
				5035	90		9725.94		1.91
				6425	110		7350.67		1.15
	25			1670	35		2110.54		1.26
	110			6875	100		9351.83		1.36
				6340	80		9783.85		1.54
	205			4372	72		7500.00		1.71
				2440	40		6000.00		2.46
				3265			6000.00		1.84
	90			3080	65		3247.55		1.05
	45			4650	85		6404.54		1.38
	235			3925	125		4000.00		1.02
	35			1930	80		1507.78		.78
	525			3205	30		2826.95		.88
				68709			95186.64		1.385
				.592		192	592.00		1.00
	380			3441	51	768	3408.00		1.00
				4033			4000.00		1.00
				77820			107336.64		1.379

Complainant's Exhibit "A" [Condensation of Timber Sale Contract Introduced in Evidence in Connection with Testimony of F. A. Silcox.]

The following is a condensation of a timber sale contract identified by F. A. Silcox, a witness for the complainant, and introduced in evidence in connection with his testimony, marked Exhibit "A." (See the preceding testimony of F. A. Silcox, page 189.)

We, the McGoldrick Lumber Co., a corporation, organized and existing under the laws of the State of Washington, having offices and principal place of business at Spokane, Washington, hereby agree to purchase all of the merchantable dry and fire-killed white pine timber, standing and down, except as hereinafter provided, in Clause 9, located on areas to be definitely designated by the Forest officer before cutting begins in surveyed townships 46 N. R. 4 and 5 E., T. 47 N., R. 4 and 5 E., B. M., within the St. Joe National Forest, and more definitely designated as the watershed of the main fork of Slate Creek, estimated to be 50,000,000 feet of white pine timber, log scaled, more or less.

We do hereby, in consideration of the sale of this timber to us, promise to pay to the Western Montana National Bank (U. S. Depository), Missoula, Montana, or such other depository or officer as shall hereafter be duly appointed by the U. S. to be placed to the credit of the U. S., the sum of $100,000.00, more or less, as may be determined by the actual scale for the white pine timber at the rate of $2.00 per M. ft. B. M., in advance payments of at least $5,000.00 each.

The requirement of forwarding $50.00 to the Western Montana National Bank, Missoula, Montana, covering the cost of advertising, the amount to be placed to the credit of the successful bidder, or refund if the bid is rejected is hereby waived.

* * * * * * * * *

And we further promise and agree to cut and remove said timber in strict accordance with the following and all other regulations governing timber sales prescribed by the Department of Agriculture. **[375]**

1. Timber upon valid claims and all under contract is exempted from this sale.

2. No timber will be cut or removed until it has been paid for.

3. No timber will be removed until it has been scaled, measured or counted by the forest officer.

4. No timber will be cut except from the area specified by the forest officer. No live timber will be cut except that marked or otherwise designated by the forest officer.

5. All cutting will be done with a saw when possible.

6. Stumps will not be cut higher than eighteen inches and so as to cause the least possible waste.

7. All trees will be utilized to a diameter of eight inches in the tops, lower when possible.

8. No charge will be made for material used in buildings, skidways, roads, bridges or other improvements, and all improvements constructed for this operation will become the property of the United States at the expiration of the contract.

9. This clause fixes the limitation of time for removing the timber and specifies the conditions under which an extension may be granted after January 1, 1917.

10. This clause specifies a rule or method by which the timber is to be scaled or counted.

11. This clause specifies the requirements as to disposal of tops, brush and debris.

12. This clause requires the purchaser to exert all his power to prevent and suppress forest fire.

13. This clause requires the purchaser and its employees to act under the control of any authorized forest officer in fighting fire.

14. This clause requires, within the limits of reason, that all branches of the logging operation shall keep pace with each other, and brush disposal not to fall behind the cutting of timber. [376]

15. The logs shall be cut in such lengths as to avoid waste.

16. This clause provides that if merchantable timber shall be left uncut, it shall be scaled and paid for at double price.

17. The maximum scaling length of all logs shall be sixteen feet, three inches to be allowed for trimming.

18. This clause provides that the forest officer may in his judgment make exceptions as to manner of cutting, etc., in cases of abnormal or defective trees.

19. Saw mills, flumes, logging railways and other structures to be constructed at points to be approved by the officer in charge and subject to such condi-

tions as he may require.

20. Logs that are decked before being scaled to have small ends marked with their respective lengths and to be piled with the scaling ends flush with the ends of the pile.

21. In scaling any timber running over ½ inch shall go to the next higher inch.

22. As much of the white timber at the time of cutting as is merchantable and reasonably accessible, in the judgment of the forest officer in charge, will be cut from the area designated.

23. The title to the timber shall not pass to the purchaser until it has been paid for.

24. The decision of the District Forester shall be final in the interpretation of regulations and provisions governing the sale, cutting and removal of the timber.

25. Work may be suspended by the forest officer if regulations contained in this agreement are disregarded and violations presisted in shall be sufficient cause for canceling the sale and all permits for other privileges.

Contract contains other provisions prohibiting members of Congress and others from participating in benefits under the contract; and no other person undergoing a sentence of imprisonment at hard labor **[377]** can be employed in carrying out the terms of the contract and specifying the condition under which deposits are to be refunded; that the contract is non assignable, and that the contract is complete and not to be changed or varied from without written consent of the District Forester; that

no other officer has or will be given authority for this purpose, and that for faithful performance of conditions of the contract, a bond in the sum of $2,000.00 is delivered, which bond, together with all moneys paid or promised shall, upon failure to fulfill all the conditions and requirements set forth, become the property of the United States as liquidated damages and not as penalty.

Signed in duplicate October 5th, 1911, McGoldrick Lumber Co., by J. P. McGoldrick, Prest. Witnessed by R. C. Lammers, W. E. Cullen. Approved by F. A. Silcox, District Forester. [378]

Complainant's Exhibit "B" [Agreement, Dated August 8, 1911, Milwaukee Lumber Co. Attached to Testimony of F. A. Silcox, Re Purchase of Fire-killed Timber].

The paper, identified by F. A. Silcox, and designated as Exhibit "B," attached to his testimony (See testimony of Silcox, page 190), is an agreement for the purchase of fire-killed timber, standing and down, located on vacant national forest land, to be definitely designated by the forest officer before cutting begins, in Sections 4, 6, 8, 18, 20, 28, 30 and 32, Township 46 N., R. 3 E., and Sections 15, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 Township 47 N., Range 3 E., B. M., within the Coeur d'Alene National Forest, Idaho, the estimated amount being 100,000,000 ft. B. M., western pine, western red cedar, Douglas fir, western larch, white fir, Englemann spruce and western hemlock, log scale, more or less, to be paid for at the stipulated

price of $2.00 per M. for white pine; 50¢ per M. for Douglas fir, white fir, western larch, Englemann spruce and western hemlock, and 75¢ per M. for all red cedar 20 inches and over in diameter, in advance payments of $10,000.00, and contains conditions and restrictions similar to those specified in Exhibit "A."

The purchaser is the Milwaukee Lumber Company, a corporation, organized and existing under the laws of the State of Idaho, and having an office and principal place of business at St. Maries, in the State of Idaho.

The contract is dated August 8, 1911, and executed by the Milwaukee Lumber Company by Fred Herrick, its President, and authenticated by its corporate seal. Witnessed by E. D. Flagg and A. V. Bradrick, and approved by A. F. Potter, Acting Forester. [379]

Defendant's Exhibit "HH" [Contract, Dated February 19, 1907, Chicago etc. Ry. Co. of Montana, and Chicago etc. Ry. Co. of Idaho].

The paper, identified by the witness, Matthew B. McBride, and introduced in evidence as Defendant's Exhibit "HH," is a general contract dated February 19th, 1907, entered into by and between the Chicago, Milwaukee & St. Paul Railway Company of Montana, a corporation of the State of Montana, and the Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation of the State of Idaho, afterwards referred to in the body of the contract as the railway companies, and Winston Brothers and Company, of Minneapolis, Minnesota, afterwards

referred to in the body of the contract as the contractors.

Section 1 of Article I of said contract provides that the contractors, in consideration of the payments, covenants and agreements to be made, kept and performed by the railway companies, will oversee and superintend for the railway companies the construction of a line of railway extending from a point approximately 12 miles west of Butte, Montana, to the mouth of the North Fork of the St. Joe River, in the State of Idaho, or to such point upon said North Fork as the chief engineer of said railway companies shall designate, excepting the line of railway embraced in a certain other contract between the same parties known as the "Hell Gate Contract," and excepting also that portion of the line of said railroad embraced in a contract with Nelson Bennett, of Tacoma, Washington, covering a tunnel and the approaches thereto in the Bitter Root Mountains; the railway companies, however, reserving the right to do such work in the construction of divisional, terminal facilities and in the construction of bridges containing permanent superstructures and their approaches, also excepting such portions of said line of railway as shall embrace the railroad of any other company or companies, the right to the use of which shall be acquired by the railway companies, or either of them.

Section 2 provides that the contractors shall do all clearing, [380] grubbing, grading, tunneling, track laying and surfacing, framing and placing of timber in pile, wooden or combination bridges, grad-

ing or changing of highways, changing or making provision for irrigating ditches or works, where such grading or change of highways or irrigation ditches or works are made necessary by the construction of the railroad; construct and erect all buildings, water stations, culverts, Howe truss bridges and fences and do all other work that the railway companies may require them to perform in the construction of said railway; the contractors also to furnish such materials as may be called for by the chief engineer of the railway companies, the railway companies to furnish ties, cement, steel bridge material and erect the same, steel rails for track, with their equipment.

Section 3 provides that the contractors will, subject to the approval of the companies' chief engineer, make all contracts for the letting of all the work mentioned that it is practicable and desirable to sublet, in their own name, at the lowest price consistent with the rapid prosecution of the work; the contractors to devote so much of their time to the work as shall be necessary for the prompt, economical and efficient prosecution thereof and shall give to the same their best skill, diligence and attention.

Section 4 provides that in the event any part of such work cannot be sublet at prices satisfactory to the said chief engineer, or in case of failure of any subcontractor to complete the same, the contractors will undertake such work and prosecute the same with diligence and economy.

Section 5 provides that all of said work shall be done under the direction of the chief engineer of the railway companies and all contracts and specifications

for the doing of all or any part thereof and all materials furnished by the contractors shall be subject to the approval of said chief engineer and all rates of wages, terms of employment, and charges for board or subsistence upon such parts of the work as shall be done by days' work, shall also be subject to his approval. [381]

Section 6 provides that the rate of progress of the work shall be at all times under the control of the railway companies and at their direction work shall be accelerated, suspended or stopped, and the contractors shall not be entitled to any damages or allowance on account of such suspension or stoppage.

Section 7 provides that the books, accounts, vouchers, contracts and all matters pertaining to said work shall at all times be open to the inspection of the railway companies.

Section 1 of Article II provides that the railway companies will, on or about the 12th day of each month, furnish said contractors detailed estimates of the amount and value of the work done by them during the preceding month, and of the amount of material by them furnished, receipted bills for such material to be furnished by the contractors during the preceding month, and on or about the 15th of each month pay the said contractors the amount shown to be due by said statements.

Section 2 provides that as parts of said line of railway are completed and put in operation, the railway companies will transport over the same, without cost to said contractors, all teams, equipments, outfits and materials required by said contractors in the

work, and all laborers, contractors, subcontractors and other employees engaged in the work, from the station on said line where such teams, outfits, material and men shall be assembled, to the station on their lines nearest said work; and upon the completion of the work will likewise transport said property and men, except laborers, from the station on said line nearest the work to the station where the same were so assembled or the station on said line nearest the headquarters of said contractors.

Section 3 provides that the railway companies will pay said contractors the amount expended by them for labor done and material furnished and pay them three per centum thereon as full compensation for all services to be by them performed, said three per centum to [382] be computed upon and to include all subcontracts made by said contractors, and the amount incurred for labor employed and material furnished by them which said three per centum shall be payable upon the monthly estimates.

Section 4 specifies exceptions of expenses to be excluded in computing the three per centum.

Section 1 of Article III provides that the contractors shall, as agents for the railway companies, establish necessary supply stores and sell at prices to be approved by the chief engineer of the railway companies, to the parties with whom they may make contracts, merchandise, provisions and materials to be used in the performance of the work, deducting the amount of such sales from the estimates or payrolls for the work done or material furnished by such parties.

Section 2 provides that the railway companies are to furnish and pay to the contractors necessary funds for the purchase of such merchandise, provisions and materials so as to provide at all times an adequate supply thereof.

Section 3 provides that the railway companies shall pay all necessary expenses of insurance, rent or cost of buildings, and the services of storekeepers, bookkeepers and laborers employed in and about the business of such supply stores.

Section 4 provides that the railway companies shall pay the contractors five per centum on the cost of such merchandise, etc., at the place of sale, including in such cost all necessary expense of insurance, etc.

Section 5 provides that monthly statements of the business connected with such supply stores shall be rendered by the contractors to the railway companies and that any balance due the railway companies shall be paid promptly by the contractors.

Section 1 of Article IV provides that the railway companies agree to accept and be bound by the agreements entered into by [383] said contractors in good faith with the approval of the chief engineer relating to the provisions of this agreement, and will defend and hold harmless said contractors in any action arising from or growing out of the performance thereof.

Section 2 provides that in case of any dispute or misunderstanding between the parties in relation to any of the covenants and stipulations contained in this agreement or their performance by either of said

parties, the president and chief engineer of the said railway companies shall be made umpires to decide all such questions, and their decision shall be final and conclusive and that each of the parties waives any and all right of action or other remedy in law or otherwise and agree to be bound by the decision of such president and chief engineer.

Signed "Chicago, Milwaukee & St. Paul Railway Company of Montana by H. R. Williams, President," with the seal of said corporation, and attested by E. W. Cook, Secretary, and "Chicago, Milwaukee & St. Paul Railway Company of Idaho by H. R. Williams, President," with the seal of said corporation, and attested by E. W. Cook, Secretary; and by Winston Brothers and Company by W. O. Winston, Vice-pres't., in the presence of W. E. Dauchy and J. H. Ellison. **[384]**

Defendant's Exhibit "BB" [Subcontract, Dated June 8, 1907, Winston Bros. & Co. and G. O. Foss & Co.].

Defendant's Exhibit "BB" is a subcontract made the 8th day of June, 1907, whereby Winston Brothers and Company, a corporation, sublet to G. O. Foss & Company the work required in clearing, grubbing, grading, etc., that portion of the line of the C. M. & St. P. Ry. Co., of Idaho lying between Station 831 and 1023 of the North Fork Line. This subcontract specifies the respective dates for commencing and completing the work undertaken by the subcontractors, and provides that their work shall be subject at all times to the inspection of the chief engineer of the railway company and to conform to the rules

and general specifications thereunto attached.

It is not to be assigned nor transferred, nor re-let, without the written consent of the chief contractors or the chief engineer.

The work to progress at such times and such particular points as the chief or assistant engineer shall direct.

The chief engineer is made an umpire to decide all matters arising or growing out of the contract. In case of failure of the subcontractor to comply with any of the stipulations, the chief contractor has the right to cancel and declare the contract void, in which case the subcontractors shall have no claim for damages, compensation or percentage retained. The chief contractors are authorized to pay the wages of laborers employed by subcontractors and deduct the amount of payments from the amount otherwise payable **[385]** to the subcontractors. The chief contractors have a right to stop any of the work or diminish the force employed and the subcontractors have no claim for damages.

Alterations may be made in the slopes of excavations and embankments, the length of sections, the grades or width of the roadbed, and such alterations shall not be allowed as a reason for any claim for extra compensation, the price to be paid per yard to cover the risk of any such change and the subcontractors to have the benefit of any alteration that may operate in their favor. The subcontractors to deposit all excavations upon the road in embankments, where needed within an extra haul of one thousand feet, according to the direction of the

chief contractors or the chief or assistant engineers and the subcontractors to be paid for the excavation only. The subcontractors to deposit all surplus excavations not needed as embankments in such place or places or as the chief contractor or the chief or assistant engineer may direct. The subcontractors to take all borrowed earth for embankments from such place or places as the chief contractors or the chief or assistant engineers may direct, and said material to be measured in embankments, and paid for only at embankment prices. Excavations for creek-beds or ditches or for changing water courses or for highways shall be deposited in the embankments where needed and paid for as excavation only. Subcontractors shall not be entitled to any damages occasioned by delay in performance of the work by any contractor adjoining the work contracted for. When any work under this agreement shall be done by the subcontractors at the request of the chief or assistant engineers for which no price is specified, the subcontractors shall be entitled to a price to be fixed by the said chief engineer. If the subcontractors shall execute any part of the work defectively and if such imperfection will not be of sufficient magnitude to require the taking up and rebuilding thereof, the chief engineer is authorized to make any deduction he may think proper from the [386] stipulated price. Any stone found in cuts suitable for masonry or rip rap shall be hauled out and deposited at such points as the chief contractors or the chief or assistant engineers may direct. The decision of the chief engineer on any point or matter

touching this agreement shall be final and conclusive between the parties and they waive all right of action or other remedy in law or otherwise. In the performance of the work the subcontractors shall be and are independent contractors and shall be solely liable for any and all injury or damage to persons or property caused by the negligence of said subcontractors, their agents, servants or employees, and they shall and will indemnify and save harmless the chief contractors from any and all loss, cost or expense on account of any such injury or damage. The chief contractors to pay on estimates thirty days after the same shall have been furnished by the chief engineer the sum which may be due at rates specified. Monthly payments to be on or about the 25th day of every month. Ninety per cent of the amount due for all work done during the previous month will be paid and the chief contractors have the right to retain ten per cent of each and every estimate until the whole work has been entirely finished and completed to the satisfaction and acceptance of the chief engineer and he shall have furnished a certificate to that effect. Subcontractors to have the benefit of free transportation over the lines of the C. M. & St. P. Ry. Co., on tools and machinery, outfits, etc., and employees within specified limits.

Contract also contains general specifications under the heads of grading, which includes excavations, embankments, clearing, grubbing, solid rock and solid rock borrow; rip rap, which includes loose and hand-placed; timber structures, which includes all timber and plank in culverts, cattle-guards, trestle-

work, bridge abutments, cattle passes and road, pile and farm bridges.

Signed—WINSTON BROS. COMPANY,
By W. O. WINSTON, Vice-pres't.
G. O. FOSS & CO.,
By G. O. FOSS. [387]

Defendant's Exhibit "CC" [Recital Re Agreement, Dated September 7, 1907, Winston Bros & Co., and A. W. Rylander & Co.].

The Defendant's Exhibit "CC" is an agreement, dated September 7th, 1907, whereby the same chief contractors sublet to A. W. Rylander & Company, the contract to do all the work required in clearing, grubbing, grading, etc., that portion of the line of the C. M. & St. P. Ry. Co., of Idaho lying between Station No. 1080 and No. 1120 of the North Fork line, which contains conditions and specifications similar in all respects to those contained in the G. O. Foss & Co., subcontract.

Defendant's Exhibit "DD" [Recital Re Subcontract, Dated June 12, 1907, Winston Bros. & Co. and Walter Arnold].

The Defendant's Exhibit "DD" is a subcontract, dated the 12th day of June, 1907, whereby the same chief contractors sublet to Walter Arnold a contract for doing all the work required in clearing, grubbing, grading, etc., that portion of the line of the C. M. & St. P. Ry. Co., of Idaho, lying between Station 1023 and 1080 on the North Fork line. Its conditions, specifications and requirements are in all respects similar to the G. O. Foss & Co. Subcontract [388]

Defendant's Exhibit "EE" [Recital Re Subcontract, Dated June 10, 1907, Winston Bros. & Co. and Sturtevant & Proctor].

The Defendant's Exhibit "EE" is a subcontract, made the 10th day of June, 1907, whereby the same chief contractors sublet to Sturtevant & Proctor, the contract for doing all the work required in the clearing, grubbing, grading, etc., that portion of the line of the C. M. & St. P. Ry. Co., of Idaho, lying between the Station 695 and 831 of the North Fork line. Its conditions, specifications and requirements are in all respects similar to the G. O. Foss & Co., subcontract.

Defendant's Exhibit "FF" [Recital Re Subcontract, Dated June 6, 1907, Winston Bros. & Co. and Stewart & Welch].

The Defendant's Exhibit "FF" is a subcontract, dated the 6th day of June, 1907, whereby the same chief contractors sublet to Stewart & Welch a contract for doing all the work required in clearing, grubbing, grading, etc., that portion of the line of the C. M. & St. P. Ry. Co., of Idaho, lying between Station No. 110, near the west portal of the St. Paul Pass tunnel, and Station No. 695 on the North Fork line. Its conditions, specifications and requirements are in all respects similar to the G. O. Foss & Co., subcontract.

Defendant's Exhibit "GG" [Recital Re Subcontract, Dated September 7, 1907, Winston Bros. & Co. and Stewart & Welch].

The Defendant's Exhibit "GG" dated the 7th day of September, 1907, is a subcontract whereby the

same chief contractors sublet to the firm of Stewart & Welch a subcontract for doing all the work required in clearing, grubbing, grading, etc., that portion of the line of the C. M. & St. P. Ry. Co., of Idaho, lying between Station No. 1120 of the North Fork line and the end of said North Fork line at Station No. 1220. Its conditions and specifications and requirements are in all respects similar to the G. O. Foss & Co., subcontract. [389]

[Certificate of U. S. District Judge to Evidence in Record on Appeal].

CERTIFICATE OF APPROVAL.

I, FRANK S. DIETRICH, United States District Judge for the District of Idaho, do hereby certify that the foregoing 241 sheets, numbered consecutively 1 to 238, including 130a, 130b and 155a, comprise the evidence to be included in the record on appeal of case No. 403, entitled United States of America, Complainant, v. Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation, Defendant; that after due notice to the solicitor for the complainant the same was presented to me for approval on the 26th day of November, 1913; that the same is true, complete and properly prepared and is

hereby approved and ordered to be filed, pursuant to Equity Rule 75.

FRANK S. DIETRICH,
Judge.

O. K.—W. C. HENDERSON,
C. H. LINGENFELTER,
U. S. District Attorney for Idaho.
C. H. HANFORD,
Solicitors for Defendant.

(Filing Endorsement.) [390]

Assignment of Errors and Prayer for Reversal.

(Caption.)

Comes now the defendant and specifies and assigns the following as errors committed by the Court in the proceedings and trial of the above-entitled cause, to wit:

1. The Court erred in denying the exception to so much of said bill as is included within the second paragraph thereof upon the ground that the same is impertinent.

2. The Court erred in denying the exception to so much of said bill as is contained in the following words: "And while said order of withdrawal was in full force and effect," contained in the first and second lines of the third paragraph of said bill upon the ground that the same is impertinent.

3. The Court erred in denying the exception to the following portion of paragraph 3 of said bill, viz.: "And including, except for some minor omissions not material to be mentioned, the land embraced in the said temporary withdrawal of March 21,

1905," upon the ground that the same is impertinent.

4. The Court erred in denying the exception to the following words contained in the fifth line from the bottom of the third paragraph of said bill, viz.: "Temporary withdrawal," upon the ground that the same is impertinent.

5. The Court erred in denying the exception to the following words, to wit: "To the said order of withdrawal and," contained in the second line from the bottom of the third paragraph of said bill on the ground that the same is impertinent. **[391]**

6. The Court erred in denying the exception to so much of said bill as is contained in the following words: "And while said order of withdrawal was in full force and effect," beginning in the first line of the fifth paragraph of said bill, upon the ground that the same is impertinent.

7. The Court erred in denying the exception to so much of said bill as is contained in the following words: "By said order of withdrawal of March 21, 1905, and subsequently," found in the second and third lines from the end of the fifth paragraph of said bill, upon the ground that the same is impertinent.

8. The Court erred in denying the exception to so much of said bill as is contained in the following words: "By said order of withdrawal of March 21, 1905," contained in the second line from the bottom of the sixth paragraph of said bill, upon the ground that the same is impertinent.

9. The Court erred in denying the exception to so much of said bill as is contained in the following

words: "By said order of withdrawal of March 21, 1905," and found in the end of the seventh paragraph of said bill, for that the same is impertinent.

10. The Court erred in denying the exception to the following matter contained in the eighth paragraph of said bill, viz., Beginning with the words: "On May 10, 1907," at the beginning of said paragraph, and ending with the words "a copy of which marked Exhibit 'F' is hereunto attached and made a part of this complaint," near the middle of said paragraph, upon the ground that the same is impertinent.

11. The Court erred in denying the exception to the following matter, contained in the tenth paragraph of said bill, beginning at about the tenth line of the first series of land descriptions contained in said paragraph, viz: [392]

> "And has thrown, rolled and deposited, and is throwing, rolling and depositing great quantities of rock, earth, gravel and debris in the Saint Joseph River in divers places, adjacent to said pretended right of way, whereby the said Saint Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log driving and will continue to be unfit and useless for purposes of navigation and log driving until said rock, earth, gravel and debris is removed therefrom, for that the same is impertinent.

12. The Court erred in overruling the following demurrer to a portion of said bill, viz:

> "To so much of said bill as alleges that this

defendant has thrown, rolled and deposited, and is throwing, rolling and depositing, great quantities of rock, earth, gravel and debris in the Saint Joseph River in divers places adjacent to said pretended right of way, whereby said Saint Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation, and will continue to be unfit and useless for purposes of navigation and log driving until said rock, earth, gravel and debris is removed therefrom; for the reasons (1) that the said complainant has no interest in said matter; (2) that the said defendant is not answerable as to said matters to the said complainant, but to the State of Idaho; (3) that the said *complaint* is not entitled to any relief with respect to said matters."

Said demurrer being set forth in the first paragraph of the demurrer filed herein.

13. The Court erred in overruling the following demurrer to a portion of said bill, viz:

"To so much of said bill as charges that this defendant, through lack of proper precaution against fire has set and caused to be set numerous fires along, upon and adjacent to said pretended right of way, and has thereby burned and destroyed and caused to be burned and destroyed, a large amount of timber, young growth and seedlings, to wit: 4,045,700 feet, board measure of merchantable timber, and 1344½ acres of seedlings upon the lands specifically described in said bill of complaint; for

that there is no equity in such matter and the said complainant has as to such matters, a plain, speedy and adequate remedy at law."

Said demurrer being set forth in the second paragraph of the demurrer filed herein.

14. The Court erred in overruling the following demurrer to a portion of said bill, viz:

"To so much of said bill as charges that this defendant is setting and causing to be set fires along, upon and adjacent to said pretended right of way; and is burning and destroying and causing to be burned and destroyed, great quantities of timber, young growth and seedlings, to the damage of said complainant; for that there is no equity in such matters, and that said complainant has, as to such matters, if true, a plain, speedy and [393] adequate remedy by the ordinary processes of law; and for the further reason that said acts, if done wilfully and intentionally, are punishable by indictment and under the laws of the United States defining and providing for the punishment of misdemeanors and felonies";

Said demurrer being set forth in the third paragraph of the demurrer filed herein.

15. The Court erred in overruling the following demurrer to a portion of said bill, viz:

"To so much of said bill as charges that the said defendant has cut and caused to be cut upon the said strip of land one hundred feet in width on each side of the center line of defendant's right of way, and prays relief with re-

spect thereto; for that it appears from the face of said bill that the said defendant had full right and authority to so cut and cause to be cut, and remove and cause to be removed, said timber; and for the further reason that there is no equity in said matters, or any thereof."

Said demurrer being set forth in the fourth paragraph of the demurrer filed herein.

16. The Court erred in overruling the following demurrer to a portion of said bill, viz:

"To so much of said bill as charges that the said defendant has cut and removed, and caused to be cut and removed, a large amount of timber upon an additional strip of land upon the uphill side of said right of way, and upon land adjacent to said strips; for that it appears from the face of said bill that there is no equity in said matters, or in any thereof."

Said demurrer being set forth in the fifth paragraph of the demurrer filed herein.

17. The Court erred in overruling the following demurrer to a portion of said bill, viz:

"To so much of said bill as charges that the said defendant has cleared, and caused to be cleared, and is clearing and causing to be cleared, portions of said lands for the purpose of constructing a railroad, and has constructed and caused to be constructed, and is constructing and causing to be constructed, a railroad; and has constructed and is so conducting its operations; that it has destroyed and caused to be destroyed, and is destroying and causing to

be destroyed large amounts of small timber and young growth upon the land theretofore described in said bill, through unskilled methods of lumbering; for the reason that it appears upon the face of said bill that there is no equity in said matters."

Said demurrer being set forth in the sixth paragraph of the demurrer filed herein. [394]

18. The Court erred in overruling the following demurrer to said bill, viz:

"To said bill for that the same is multifarious in this: That the said complainant has joined in said bill, matters for which the said complainant has a plain, speedy and adequate remedy at law with matters of equitable cognizance, the said matters being separate and distinct; that the said complainant has joined in said bill a cause of action arising out of an obstruction of a highway of the State of Idaho, and with which the said complainant has nothing to do, with a cause of action for damages arising out of any alleged negligent acts of said defendant in setting out fires and thereby burning and destroying timber, together with an alleged cause of action for wilful waste and continuous trespass."

The same being set forth in the seventh paragraph of said demurrer.

19. The Court erred in overruling the following demurrer to said bill, viz:

"To the said bill for that the same is without equity and does not set forth any matters en-

titling said complainant to any relief in this court."

The same being set forth in the eighth paragraph of said demurrer.

20. The Court erred in failing to sustain the defendant's objection, upon *the that* it is immaterial, to the admission of the matter set forth in the third paragraph of the stipulation of facts.

21. The Court erred in failing to sustain the defendant's objection, upon the ground that it is immaterial, to the admission of the matter set forth in the twelfth paragraph of the stipulation of facts.

22. The Court erred in failing to sustain the defendant's objection, upon the ground that it is incompetent, to the introduction of the letter of March 4, 1905, Plaintiff's Exhibit 1.

23. The Court erred in failing to sustain the defendant's objection to the testimony of the witness Door Skeels as to the quantity of timber cut and timber values, which objection was based upon the following grounds to wit: (a) that under the issues of this case such questions were irrelevant and immaterial, **[395]** that under the pleadings no questions of quantities of timber were involved; and (b) that under the admissions in the pleadings and in the stipulation, the defendant had the right to take all of the timber on the 200 foot right of way and all other timber adjacent to the right of way which it needed for construction purposes.

24. The Court erred in failing to sustain the defendant's objections to testimony given by Dorr

Skeels, a witness for the complainant, in the following words:

> "From the Southeast Quarter of the Southeast Quarter of Sec. 26, Tp. 47 North, Range 6 East; 200 ft. board measure, white pine; 800 ft. board measure lodge-pole pine; 9,400 ft. board measure of spruce; 3,500 ft. board measure of white fir; a total of 13,900 ft. board measure. On the SE. ¼ of the SE. ¼ of Sec. 26, Tp. 47 N., R. 3 East, 400 ft. board measure white pine, 1,600 ft, board measure lodge-pole, 18,800 ft. board measure spruce, 7,000 ft. white fir; total 27,800 ft. board measure."

and to the questions propounded to said witness and answered by him as above quoted, which objections were on the following grounds, to wit:

The questions as propounded required the witness to use memoranda prepared by the witness to aid his memory and also to state any independent knowledge of the witness that he should care to state, and that the witness was asked to read into the record documents which he had stated were not his original memorandum, but compilations prepared by him from his original memorandum, and therefore not admissible as books of original entry, and if not admissible evidence, they cannot be gotten into the record by having the witness read them into the record under the form of refreshing his memory, and on the further ground that under the circumstances if the witness has individual knowledge, he is not entitled to refresh his memory from his memorandum or in any manner. The intention

being by the proposed mode of proof to get before the Court the documents themselves rather than the witness' testimony.

25. The Court erred in failing to sustain the defendant's objection to the admission in evidence of exhibits 2 to 33, inclusive, for the reason that the same were not the original memoranda prepared by the witness, but were complications subsequently prepared **[396]** by him from such original memorandum.

Said exhibits are documents too voluminuous to be quoted. In substance they are complications of memoranda prepared by the witness, Door Skeels, showing the kinds and quantities of timber cut upon specified subdivisions of land within the Coeur d'Alene Forest in clearing the defendant's right of way.

26. The Court erred in failing to sustain the defendant's objection to the admission in evidence of Exhibit 34, for the reason that the same was not an original memoranda, but was a compilation prepared by the witness, Door Skeels, at times subsequent to the time of acquiring information from original sources. Said exhibit is a document too voluminous to be quoted. In substance it is a copy of a report made by said witness to the Chief of the Forest Service concerning alleged timber trespasses in the Coeur d'Alene Forest and timber cut and to be cut in clearing the right of way of the Chicago, Milwaukee & St. Paul Railway Company of Idaho, and has annexed to said report a detailed statement by legal subdivisions showing the varie-

ties and quantities of timber on each of the several legal subdivisions of land therein specified.

27. The Court erred in failing to sustain the dedendant's objections to the questions propounded to the witness Dorr Skeels as to the condition of the East Fork and Little North Fork streams with reference to their navigability for logs and to the testimony given by said witness in response to said questions, for the reason that said testimony is irrelevant, immaterial and incompetent under the issues in this case.

The substance of the testimony to which this assignment relates is as follows:

> "Coming down the river from the junction of the Little North Fork and the East Fork, the first obstruction of which I prepared a memorandum was in the river at a point a little above the east portal of Tunnel No. 30 in the SE. ¼ of Sec. 7, Tp. 46 North, Range 6 East. The rock at that point was thrown into the creek, filling the channel completely from bank to bank at the normal stage of water and backing the water for a distance of about 200 feet. The next obstruction coming down the river was at the east portal of Tunnel No. 31 on the line between Section 7 and 18, partly in each **[397]** section, Tp. 46 N., R. 6 East. The boulders and broken rock were thrown from the right of way into the channel so as to completely fill it and back the water into the stream for a considerable distance, making log driving impossible.

The next obstruction of which I have any memorandum was at the west portal of No. 31 in the NE.¼ of Sec. 18, Tp. 46 N., R. 6 E. Boulders and broken rock were thrown from the fill at the portal of the tunnel into the channel of the stream so as to completely fill it and back the water into the stream for a distance of several hundred feet, making log-driving impossible. The next obstruction was from 100 ft. to 200 ft. below the west portal of Tunnel No. 32 in the SW. ¼ of Sec. 18, Tp. 46 N., R. 6 E. The rock fills the channel of the creek for 200 ft. along its course and has already formed a big jam of drift wood above it, the rock in the stream rendering log-driving impossible. The next point was at the west portal of No. 33 in Sec. 24, Tp. 46 N., R. 5 E. The rock was thrown down along the base of a large fill, filling the creek channel completely with broken rock for a length along the creek of 250 ft., blocking up the water for 700 ft. above the obstruction, rendering log-driving impossible. All of the distance for which the water is backed and the reference to filling the stream is at the normal stage of water. The next obstruction is about three-eighths of a mile and below the west portal of Tunnel No. 33 in SE. ¼ of Sec. 46 N., R. 5 E. Several large masses of rock ten to twenty feet in diameter have been thrown into the creek and filled its bed for a width of fifty ft. rendering the stream unfit for log-driving. The next obstruction is a short distance above the east

portal of Tunnel 34, SW. ¼ of Section 25, Tp. 46 N., R. 5 E.; several large boulders from 8 to 16 ft. in diameter have been thrown in from the right of way into the creek forming a complete obstruction to log-driving. The next obstruction was about a mile from Avery where the creek channel has been completely filled by a fill made to form a right of way and the channel of the creek destroyed and thrown out into the surrounding country to make its own channel.

The railroad ran along the course of the river and they built the fill out to fill the river, throwing the stream out over the lower bank to cut its way around the fill.

I know of my own knowledge that those obstructions were made by the Chicago, Milwaukee & St. Paul Railroad Company of Idaho.

The Government has more than 2,000,000 ft. of merchantable timber on the waters of this stream above the rock obstructions to which I have testified.

NOTE.—Mr. Dudley, in behalf of the defendant, objected to testimony referring to means of transportation which the Government has for this timber because not material or competent.

For more than half of this timber the sole means of transportation is by the North Fork of the St. Joe River. For the remaining part of the timber which I mention, the best and cheapest method of transportation is by the North Fork of the St. Joe River, although it might at great cost be gotten up to the right of

way and loaded on the railroad and transported in that manner."

28. The Court erred in failing to sustain the defendant's objection to the introduction of all testimony relative to fires, interposed upon the ground that whatever damages resulted from fires would have to be recovered in an action at law, and that a court of equity was without jurisdiction to pass upon such matters, and that such testimony was incompetent under the issues in this case. The **[398]** substantial part of the testimony given, notwithstanding said objection, and to which this assignment relates being as follows:

The witness Door Skeels testified:

"I know of my own knowledge of fires having been started on the right of way in the summer of 1908. One started at Burns & Jordan's camp; one started in what they call the "loop" at a point where this railroad crosses Kelly Creek; one started at a point a short distance above Sturtevant & Proctor's camp in the NE. ¼ of Section 7, Tp. 46 N., R. 6 East, and several other fires started along there for which I cannot give a definite location at present.

The fire that started near the Burns & Jordan's camp burned over about 30 acres; the worst fire started in the clearing made at Kelly Creek Bridge and burned north and east to the summit of the Bitter Root Mountains. It covered the greater part of four sections.

The fire killed the timber and young growth.

I did not make an estimate of the timber that

was burned. I had Mr. Seery make an estimate under my direction."

The witness Richard H. Rutledge testified:

"To a certain extent I am familiar with the burned district testified to by Mr. Skeels.

I was on the scene of the 'loop fire' or the Kelly Creek fire soon after it started. I know where the fire originated.

The contractors started those fires. I am able to state that the contractors started the fires from the fact that they were using fire in their burning at those places right along, practically continuously, and that there was no other visible source for the fire.

I was able to trace the fire by its course from the right of way to the points where it spread."

The witness Henry F. Kottkey gave testimony as follows:

"Practically all the fires but one I had in that district, which was a good many, could have been traced, for I have seen a good many of them started from the right of way of the Chicago, Milwaukee & St. Paul Railway Company, ever since they started the construction work.

All those fires originated from the brush burning or from sparks from the locomotive which fell into the brush.

In 1907 there was at least six or seven fires that originated on the right of way. All those fires I have spoken of originated on the right of way.

There was one fire at the camp of G. O. Foss

& Co. where a man had been washing his clothes and left a fire burning; that was one fire that did not originate on the right of way. It went over the right of way and burned timber on each side.

I can recall where the first fire was in 1907. It was Kennedy & Frazier's work at the mouth of Turkey Creek. When that fire started I was patroling the lower end of the right of way down to the wagon road and a man came on horseback to notify me that there was a fire that got away from a man that was working there at Kennedy & Frazier's. When I got down there it had burned over about five or ten acres. You could trace this fire; fire leaves a track. I didn't see it start.

Kennedy and Frazier were contractors working on the road for the Chicago, Milwaukee & St. Paul. **[399]**

The next fire that I recall in 1907 was from Charlie Johnson, contractor. That was east of the south of Kelly Creek. When it started I was, I guess, about three or four miles from the place where the fire started. I had been there that forenoon and seen the man burning the right of way and, of course, I draw my conclusions that when the fire got away it started from there."

The witness Otto F. Hanson testified:

"I saw one fire. It originated about 300 yards from where I was living; it kept me fighting fire for a while. That fire started about 200

yards west of tunnel 30 on the right of way. It burned over about forty acres. Most of that area was covered with small timber. It went all the way from pretty near brush up to six or eight inches. It was lodge-pole, yellow pine and fir, all mixed."

The witness Daniel F. Seerey testified:

"I made an estimate of the timber that was standing on the burned district near the right of way. I commenced on what was known as the 'loop fire' and worked in connection with the men appointed by the railroad company.

By the indication on the ground I could see that the fire started close to the steel bridge they were constructing across Kelly Creek. The fire ran north and the west side of Section 7 north up Kelly Creek and extended into Section 6, same township and range, across over in an easterly direction Section 5, same township and range, into Section 8, to the west side of Section 8, crossing over in a northeasterly direction into Section 9, close to the Richmond mine and east to the Monitor mine, in Section 8, back in a southwesterly direction to the 'loop' in Section 8. This map I hold before me contains a correct description of the burned area as described by me and the approximate acreage. Mr. Baker and I did make an estimate of the amount of timber that was burned over on each subdivision, and that amount is correctly stated on that map.

I noted the amount of seedlings that were burned.

I talked the matter over with Mr. Baker and Mr. Long; they did not assume the responsibility for the fire but they did for the timber that was destroyed, and eventually assumed the responsibility for the fire."

The witness identified Exhibit 35 introduced in evidence to show the acreage burned over and the kinds and quantities of the timber burned, for which the Government seeks to recover damages in this case.

29. The Court erred in failing to sustain the defendant's objection to the interrogatories propounded to the witness Rutledge relative to the condition of the St. Joe River and its tributaries, which objection was upon the ground that such matter was incompetent under the issues in this case and that any damages, if the navigability of the stream was impaired, would be properly the **[400]** subject of an action at law, and could not be gone into in this suit in equity.

The witness Rutledge, notwithstanding the defendant's objections, gave testimony of the same character and import as the testimony of the witness Skeels relating to the depositing of rock and debris in said river and its tributaries.

30. The Court erred in failing to sustain the defendant's objection to the interrogatories propounded to the witness Hamilton relative to the condition of the North Fork and other streams and their suitability for driving logs, which objection

was interposed upon the ground that such matter was incompetent under the issues in this case, and that such matter afforded no ground for equitable relief.

The witness Hamilton gave testimony, notwithstanding the defendant's objection, of the same character and import as the testimony of Skeels and other witnesses relative to the depositing of rock and debris in the streams referred to.

31. The Court erred in failing to sustain the defendant's objection to all testimony concerning timber cut and the value thereof, concerning timber burned and the value thereof, and concerning the obstructions to the river, which objection was interposed upon the ground that there was no equity in such matters and that such evidence was incompetent and immaterial under the issues in this case, which objection was understood to apply to the testimony of all the plaintiff's witnesses upon these matters.

The substance of the testimony to which this assignment relates was given by different witnesses called in behalf of the plaintiff to the effect that along the defendant's right of way crossing specified subdivisions of land owned by the Government, merchantable timber was cut and consumed by the defendant in the construction of its railroad; that other merchantable timber was cut for the purpose of clearing the right of way and was destroyed; that other timber [401] was cut on land adjacent to the right of way, partly in compliance with requirements of the Forest Service for clearing the ground,

and partly for use in the construction of the railroad; that fires swept over areas on which there was a start of merchantable timber and other areas on which there was a stand of young growth of trees of the kinds that make merchantable timber; that merchantable timber was damaged by being burned and the young growth was destroyed by being burned, and the witness testified further that they had made notes of their examinations, measurements and estimates to determine the amount of acreage, the quantity of timber of the different kinds destroyed and damaged and valuations upon the same, and that from their examinations and memoranda Exhibits 2 to 33, Exhibit 34 and Exhibit 35 and Exhibits 1A, 2A, 3A and 4A were made up, all of which exhibits are attached to the evidence which was submitted to the trial court. But the Court made no ruling on defendant's objections and gave no intimation as to whether the testimony of the witnesses objected to or the said exhibits, or either of them, were sustained or overruled, or whether the incompetent, irrelevant and immaterial matters put in evidence were considered by the Court in rendering its decision, although the defendant in due time filed written specifications of the particular matters and items of evidence objected to, which called for a specific ruling as to said matters.

32. The Court erred in failing to sustain the defendant's motion to strike out the statement made by the witness Seery that Mr. Baker and Mr. Long eventually assumed responsibility for the fire or stated that it was a valid claim against the company,

which motion was upon the ground that it was not shown that Baker and Long had any authority to make such a statement that would be binding against the defendant, or to make any statement whatever that would be valid or competent in this case. [402]

33. The Court erred in failing to sustain the defendant's objection to Exhibit 35 attached to the deposition of the witness Seery, made upon the ground that it was a self-serving statement, incompetent and not properly verified.

Said Exhibit 35 is a document too voluminous to be quoted. In substance it is a statement by legal subdivisions showing the acreage, kinds and quantities of timber with respect to which the plaintiff claims damages in this case.

34. The Court erred in failing to sustain the defendant's objection to the following question asked of the witness Seery: "What was the amount of damage agreed upon between you and Mr. Baker and Mr. Long?" which objection was on the ground that Mr. Baker and Mr. Long have not been shown to have authority to make any agreement in that behalf; notwithstanding said objection the witness Seery gave the following answer to said question:

> "At $4.00 per thousand $16,182.80. The amount of seedlings was 1344½ acres, mixed seedlings at $10.00 per acre. I put that arbitrarily and I found since that it would cost more than that to re-seed that area. The total amount agreed upon was $29,627.20."

35. The Court erred in failing to sustain the defendant's objection to the admission in evidence of

the Government's Exhibit 1A in so far as it purported to show values, for the reason that such values are based on an incorrect method of arriving at the value of the timber destroyed and for the reason that the qualification of the witness to testify as to the value was not shown.

Said Exhibit 1A is a document too voluminous to be quoted. It consists of a tabulated statement on four sheets showing in columns descriptions of the area to which the figures refer, the subdivision of sections, the condition of young trees, the age of immature timber on the areas burned, and variety of matters on which the witness based theoretical estimates of the values which young trees would have after reaching maturity, estimating the age of one hundred years to be maturity of that class of timber. [403]

36. The Court erred in failing to sustain the defendant's objection to the introduction of Exhibit 2A, the grounds for such objection being as stated that so far as it showed the quantities of timber in the burned areas, it was a duplicate of the Government's Exhibit 1A, that in so far as it purports to show the cost of restocking and the value of the timber arrived at in that manner, it was immaterial, irrelevant and incompetent, the method not being a proper one to get at the market value of young timber, and upon the ground that the qualifications of the witness to testify as to the cost had not been established.

Exhibit 2A is a document too voluminous to be quoted. It consists of three sheets attached together

containing a tabulated statement of the same nature and import as Exhibit 1A.

37. The Court erred in failing to sustain the defendant's objection to the admission of Exhibit 3A, the grounds of said objection being the same as those interposed to the admission of the Government's Exhibit 1A.

Said exhibit is a document too voluminous to be quoted. It consists of two sheets attached together containing a tabulated statement of the same nature and import as Exhibits 1A and 2A.

38. The Court erred in failing to sustain the defendant's objection to the admissibility of the Government's Exhibit 4A, the grounds of said objection being the same as those interposed to the admission of the Government's Exhibit 2A, and the further ground of objection to the admissibility of all of said exhibits, viz., that they are not competent under the issues of this case, the remedy for such injury, if any, being at law and a court of equity having no jurisdiction.

Said Exhibit 4A is a document too voluminous to be quoted. The same consists of two sheets containing a tabulated statement of the same nature and import as Exhibits 1A, 2A and 3A. [404]

39. The Court erred in failing to grant defendant's motion to strike out all the testimony of the witness Rockwell for the reasons assigned and the various objections interposed, and for the further reason that it appears that in his estimates of the cost he had allowed an unwarrantable rate of interest based on the estimated value of the timber at ma-

turity, and that there was no definite allowance for insurance, or the probability that the timber would have been destroyed from other causes, and upon the further ground that the testimony was not competent as furnishing any basis for equitable relief.

The substance of the testimony of said witness being as follows:

> As a Forest Officer I made an examination of burned areas along the right of way of the Chicago, Milwaukee & St. Paul Railway Company in the Coeur d'Alene National Forest in Idaho during the summer and fall of 1909. I had for my guidance in making that examination maps and have those maps with me. Daniel F. Seery identified this map as a copy of one used by him in his examination of this same area. This map shows the area that was burned over by the fire extending along the Milwaukee right of way. I located the area burned on the ground and compared the area with the map. The burned area, located in T. 46 N., R. 7 E. extended over land aggregating 1016 acres in Sections 5, 6, 7, 8, 9, 17 and 18. That covers all the area in this particular burn. I first made a casual examination to see the extent of the burn and what damage the fire had done and then made a study of the timber in the vicinity and what species were growing in that locality, what the rate of growth was and how much timber an acre of land would produce. I selected areas in the adjoining green timber which were growing under exactly the same conditions as were

found on the fire areas, and carefully surveyed the plots. Then I measured the timber on each area. I calipered the trees at diameter, breast high, to find out how many trees there were of each diameter and of each species, and after having determined this, I selected average trees of the various diameters and cut these down; measured the diameters of the logs to determine the board feet contained, and in every case determined the age of the trees. From the volume of the average trees I determined the total volume per acre. I determined that the age at which the stand became merchantable was one hundred years. At the average age of one hundred years, the average diameter of the white pine was a little over twelve inches and red fir and larch slightly larger than that. I determined that the area was seventy-five per cent fully stocked and I had found from my examination of adjoining areas that fully stocked stands of that same kind of timber at one hundred years produced a certain amount of timber which would have a corresponding value at the stumpage rate of $4.00 per thousand. This would be the value of that young growth at maturity. The stand, however, was destroyed at fifteen years of age, so for eighty-five years the Government would not be required to care for that area to protect it. To ascertain the value of the present stand at fifteen years of age, I subtracted the cost for caring for the stand for eighty-five years from the value which could

have been received for the timber at maturity,—the amount per year per acre which would [405] have been necessary to expend in the care of that area if it had not been destroyed by fire would have been three cents per acre. After determining what the value of the timber would be at maturity minus the cost of caring for the timber for the remaining time which the timber would have to stand in order to mature, the amount thus obtained was discounted to the present time by compound interest tables at three per cent. There were ten acres of immature timber ninety years of age, thirty per cent white pine, fifty per cent Douglas fir, fifteen per cent white fir, and five per cent western larch. I determined that it has a value of $576.35. I considered that the most practicable means which might be used in restoring this legal subdivision to its condition before the fire to be planting. The cost would be $15.00 per acre for replanting the stand with the same kind of young trees as were there before the fire. Taking the eight acres upon which the stand had an average of fifteen years, the total cost would be $143.76 for replanting that area with the species that had been destroyed and caring for the growth until it reached the age at which it was destroyed, and on the area of ten acres on which the average was ninety years, the total cost to the Government of replanting that area and caring for it until it reached the age of ninety years would be $1129.00. Since part of this timber has been

merchantable, however, the value of the merchantable part, $400.00, was subtracted from the total to get the value of the young growth alone, or $739.00. In the preparation of these sheets, Exhibits 1A, 2A, 3A, and 4A, I used the method first described.

40. The Court erred in failing to sustain the defendant's objections to the testimony of the witness William W. Morris. The testimony of said witness merely corroborated that given by the witness Rockwell.

41. The Court erred in not sustaining the defendant's motion to strike the testimony of the witness, F. A. Silcox, as to the cost of fire protection, such motion being upon the ground that the testimony was incompetent, immaterial and irrelevant under the issues in this case.

The substance of the testimony of said witness was that in the district which includes the Coeur d'Alene National Forest, in connection with its timber sale work and fire protection, the Government is spending for all work about $742,000.00, which makes on 29,000,000 acres approximately 2½ cents per acre. For administration and timber sales it would be approximately one cent an acre and about one-half a cent an acre for fire protection proper. I figured that for three cents an acre we could put a man on fire patrol who can take care of the timber sale work on the present basis with a [406] reasonable increase in sales and in addition provide one man for fire patrol to every thirty acres, depending on the fire danger. Of course fire danger cannot be en-

tirely eliminated, but it will be reduced to a minimum, so much that we feel that it will be fairly safe. On a basis of one man for one-half township, he would be within approximately three miles of any fire started.

42. The Court erred in failing to hold that the order of withdrawal, made by the Commissioner of the General Land Office March 21, 1905, was void.

43. The Court erred in failing to hold that the defendant corporation had, prior to November 6, 1906, the date of the President's proclamation creating the Coeur d'Alene National Forest, by its compliance with the terms and provisions of the acts of Congress approved March 3, 1875, acquired the grant of a right of way with the privilege of taking material of earth, stone and timber for the construction of its road, which was prior in time and in right to the reservation of said lands.

44. The Court erred in failing to hold that *that* the grant to the defendant railway company of a right of way through said Forest Reserve, with the privilege of taking material of earth, stone and timber adjacent to the line of its road for the construction thereof was, by the terms of the President's proclamation of November 6, 1906, excluded from the operation of said order.

45. The Court erred in failing and refusing to hold that forest reserves, created by proclamation of the President, did not operate to prevent the acquisition of rights, privileges and grants under the terms and provisions of the act of Congress approved March 3, 1875. [407]

46. The Court erred in failing to hold that by neither the withdrawal of March 21, 1905, or the President's proclamation, the lands in question were reserved and excluded from the operations of the grant of the act of March 3, 1875.

47. The Court erred in holding that the provisions of the act of Congress, approved March 3, 1899, limited the grant made by the act of Congress, approved March 3, 1875, through forest reserves, to a grant of land only for right of way.

48. The Court erred in failing to hold that the stipulation prescribed by the Government was unreasonable and in excess of the powers of the executive officers of the Government.

49. The Court erred in failing and refusing to hold that the so-called "Peck Agreement" was void and unenforceable.

50. The Court erred in holding that the defendant acquired no rights under the act of March 3, 1875, and that by the act of March 3, 1899, a grant is made conditioned upon the precedent approval of the Secretary of the Interior.

51. The Court erred in holding that the so-called "Peck Agreement" was one which a court of equity would specifically enforce.

52. The Court erred in failing to dismiss the action when it found that the stipulation, which the complaint prayed that the defendant be required to execute, was not such a stipulation as was covered by the terms of the so-called "Peck Agreement."

53. The Court erred in requiring the defendant to execute an agreement which was never demanded

by the United States, or within the terms of the bill of complaint.

54. The Court erred in failing to hold that the provision in the stipulation requiring the defendant to pay for timber cut upon the right of way, or taken for construction purposes from lands adjacent to the right of way, was not within the authority conferred upon the executive officials of the United [408] States and was in conflict with the grants made by the act of Congress approved March 3, 1875, and any supplemental acts.

55. The Court erred in failing to hold that the provisions of the stipulation requiring the defendant to pay for timber burned in the course of the construction of said road was beyond the authority of the executive officials of the United States and was in conflict with the provisions of the act of Congress approved March 3, 1875.

56. The Court erred in finding that the plaintiff is entitled to recover from the defendant the sum of $26,989.00 for timber cut upon the right of way and contiguous lands, and $12,000.00 on account of mature timber burned.

57. The Court erred in finding that the plaintiff is entitled to recover the sum of $24,000.00 for timber destroyed by fire.

58. The Court erred in finding that the plaintiff is entitled to recover of the defendant the sum of $5,500.00 on account of rock and other debris thrown into the St. Joe River and its tributaries.

59. The Court erred in failing to hold that the defendant had the right to cut and remove without

charge therefor all of the timber growing upon its right of way and such timber growing upon lands adjacent to said right of way.

60. The Court erred in failing to hold that it was without jurisdiction to award to the plaintiff any damages (a) for timber cut or removed from the right of way or contiguous land; (b) or for timber removed; (c) or for immature timber destroyed; and (d) for injuries sustained by rock and other debris being thrown into the St. Joe River, or its tributaries, and denying unto the defendant the right to a trial by jury upon said several questions.

61. The Court erred in holding that the said plaintiff was entitled to recover the sum of $68,489.00, or any other sum whatsoever. [409]

62. The Court erred in requiring the defendant to make or enter into a stipulation to clear lands outside of the limits of the right of way prescribed by the act of Congress approved March 3, 1875.

63. The Court erred in requiring the defendant to execute a stipulation providing for payment unto the plaintiff for all or any timber or wood cut within the right of way.

64. The Court erred in requiring the defendant to enter into a stipulation to pay for any timber cut outside of the right of way in compliance with any orders or directions of the executive officials of the United States.

65. The Court erred in requiring the defendant to enter into a stipulation agreeing to pay for cordwood the sum of $1.00 per cord, or any sum, or for timber the sum of $3.00 per thousand, board measure,

for merchantable timber, or any sum, or to accept as final the decision of an executive officer or employee of the United States as to the quantity of timber so cut.

66. The Court erred in requiring the defendant to enter into a stipulation to put in a sidetrack sufficient to handle timber and wood sold from the said National Forest.

67. The Court erred in requiring the defendant to enter into a stipulation to pay for timber burned, or to pay unto the plaintiff, or *pur* into any depository for its benefit, any sum whatsoever for timber burned.

68. The Court erred in entering any judgment against said defendant, or any judgment in said cause whatsoever other than a decree of dismissal.

WHEREFORE, the said defendant prays for a reversal of the decree of the said United States District Court for the District of Idaho, Northern Division, in that certain action brought by the United States of America, as complainant against the [410] Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation, as defendant, which decree is dated, to wit, June 11th, 1913, and that said decree may be set aside and wholly held for naught.

(Signatures of Solicitors for Defendant.)

(Service admitted.)

(Filing endorsement.) [411]

Order Fixing Amount of Bonds on Appeal and Allowing Appeal.

(Caption.)

Upon application of solicitors for the defendant, IT IS ORDERED by the Court that the cost bond on appeal be and the same is hereby fixed at Five Hundred Dollars ($500.00).

The defendant having served and filed a notice of appeal, an assignment of errors and a satisfactory bond for costs, IT IS FURTHER ORDERED by the Court that its appeal from the decree of this court in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed.

Dated this 25th day of November, 1913.

FRANK S. DIETRICH,
Judge.

(Filing Endorsement.) [412]

Notice of Appeal.

(Caption.)

The above-named defendant, Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation, conceiving itself aggrieved by the decree entered in the above-entitled cause on the 11th day of June, A. D. 1913, ordering and decreeing that said defendant should, within thirty days from the date thereof, deliver unto the said Court the duplicate maps of its definite location through the Coeur d'Alene Forest

Reserve, being the maps filed in the Coeur d'Alene, United States Land Office May 10, 1907, and also within said thirty days, to execute and deliver unto the Court a certain stipulation in said decree set forth, and also that the said complainant should have and recover from the defendant the sum of $68,489.00, together with costs, does HEREBY APPEAL from said decree, and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

(Signed by Solicitors for Defendant.) [413]

Coeur d'Alene City, November 25, A. D. 1913.

And now, to wit, on this 25th day of November, A. D. 1913, IT IS ORDERED that the above appeal be allowed as prayed for.

FRANK S. DIETRICH,
United States District Judge.

(Acceptance of service omitted.)

(Filing endorsement.) [414]

Order to Transmit Original Exhibits with the Transcript on Appeal.

(Caption.)

For the reason that in the opinion of the presiding Judge of this court it is proper that the Plaintiff's Exhibits Nos. 2 to 33, inclusive, 36, 37, and 38 and 39 and 1A, 2A, 3A, and 4A and defendant's Exhibit

B, B and Exhibit X shall be inspected by the United States Circuit Court of Appeals for the Ninth Circuit, to which this cause has been appealed, therefore,

IT IS ORDERED that said exhibits be by the Clerk of this court transmitted with the transcript on appeal to the Clerk of the said Appellate Court.

Dated this 25th day of November, 1913.

FRANK S. DIETRICH,
Judge.

(Filing Endorsement.) [415]

Notice of Application to Permit a Supersedeas Bond to be Filed.

(Caption.)

To C. H. Lingenfelter, United States District Attorney for Idaho:

You are hereby notified that an application will be made in behalf of the defendant in the above-entitled cause to the Honorable William B. Gilbert, one of the Judges of the Appellate Court, to grant permission for the filing of a supersedeas bond in the sum of Seventy-five Thousand Dollars ($75,000.00) at his chambers in the city of Portland, Oregon, on the 20th day of December, 1913, at ten o'clock A. M., or as soon thereafter as counsel can be heard.

(Signed by Solicitors for Defendant.)

(Verification omitted.)

(Endorsement Filing.) [416]

Appeal Bond.

(Caption.)

KNOW ALL MEN BY THESE PRESENTS That we, THE CHICAGO-MILWAUKEE & ST. PAUL RAILWAY COMPANY of IDAHO, a corporation, and NATIONAL SURETY COMPANY of NEW YORK, a corporation organized under the laws of the State of New York and authorized to become surety upon bonds in the State of Idaho under the laws of said State, are held and firmly bound unto the above-named United States of America in the sum of Five Hundred Dollars, to be paid unto the said United States of America, for the payment of which well and truly to be made we bind ourselves, our and each of our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 24th day of November, A. D. 1913.

WHEREAS, the above-named Chicago, Milwaukee & St. Paul Railway Company of Idaho has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to reverse the decree rendered in the above-entitled action by the Judge of the United States District Court for the District of Idaho, Northern Division;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Chicago, Milwaukee & St. Paul Railway Company of Idaho shall prosecute said appeal to effect and pay all damages and costs, if it fail to make said appeal [417] good, then this obligation shall be void; otherwise

the same shall be and remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO,
By S. H. BARKLE,
Assistant Secretary.

NATIONAL SURETY COMPANY,
[Corporate Seal] By GEO. W. ALLEN,
Attorney in fact.

Approved Nov. 25, 1913.

FRANK S. DIETRICH,
Judge.

(Filing Endorsement.) [418]

Praecipe [for Transcript of Record.]

(Caption.)

To the Clerk of the above-entitled District Court:

For the purpose of an appeal from the final decree entered in this case to the United States Circuit Court of Appeals, Ninth Circuit, you are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at his office in San Francisco, a transcript of the record, containing the papers and matters hereinafter specified.

Except as specified, omit from each paper the captions, proof of service, certificates, verifications, signatures and endorsements thereon. The contents of the transcript to be:

1. A caption exhibiting the proper style of the court, the name of the Judge who tried and decided the case, the title of the case, and the

name and addresses of the solicitors for the respective parties.

2. A summary of the proceedings, specifying the date on which the different papers were filed and proceedings occurred.
3. The bill of complaint with amendments thereto incorporated, and exhibits attached thereto.
4. The defendant's exceptions to the bill of complaint.
5. The defendant's demurrer to the bill of complaint.
6. The memorandum decision overruling the exceptions and demurrer.
7. The journal entry of the order overruling said exceptions and demurrer.
8. The defendant's answer with amendments thereto incorporated and the exhibit annexed thereto.
9. The replication. [419]
10. The condensed statement of the evidence as approved by the Judge of the above-entitled court, including all exhibits incorporated or annexed and the order of approval.
11. The defendant's written specifications of objections to the admission of evidence.
12. The opinion of the Court filed April 1, 1913.
13. The journal entry of the order or interlocutory decree of the Court based upon said opinion.
14. The supplemental decision of the Court.
15. The final decree.
16. The defendant's notice of appeal, including the

endorsement thereon of allowance by the Judge.

17. The order allowing an appeal and fixing the amount of bonds for an appeal.

18. This praecipe.

Indicate omissions in places where they occur in brackets, e. g. (Caption.) (Filing Endorsement.)

You are also requested to transmit with said transcript the citation and also all exhibits filed in the cause which by order of the Court are to be transmitted to the Circuit Court of Appeals in their original form, and the order of the Judge extending the time for filing the transcript with the Clerk of the Circuit Court of Appeals, and docketing in the case.

Dated this 25th day of November, 1913.

F. M. DUDLEY,
H. H. FIELD,
Solicitors for Defendant. [420]

[Citation on Appeal (Original).]

In the United States District Court, for the District of Idaho, Northern Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Defendant.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden at San Francisco, in the State of California, on the 22d day of December, A. D. 1913, pursuant to an appeal filed in the office of the clerk of the United States District Court for the District of Idaho, Northern Division, wherein the Chicago, Milwaukee & St. Paul Railway Company of Idaho is appellant and the United States of America is respondent, to show cause, if any there be, why said decree should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 25th day of November, A. D. 1913.

FRANK S. DIETRICH,
United States District Judge.

Service by copy admitted this 25th day of Nov. 1913.

C. H. LINGENFELTER,
U. S. Atty. [421]

[Endorsed]: No. 403. In the United States District Court, for the District of Idaho, Northern Division. United States of America, Plaintiff, vs. C. M. & St. P. Ry. Co. of Idaho, Defendant. Citation. Filed Nov. 25, 1913. A. L. Richardson, Clerk. [422]

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. **[423]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation.

Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 424, inclusive, to be full, true and correct copies of the pleadings and proceedings, in accordance with praecipe on file herein, in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to

the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $254.80, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 16th day of December, A. D. 1913.

[Seal] A. L. RICHARDSON,
Clerk. [424]

[Endorsed]: No. 2351. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee and St. Paul Railway Company of Idaho, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Received and filed December 19, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2351

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighteenth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order of Submission.

ORDERED, appeal in the above-entitled cause argued by Messrs. F. M. Dudley, and H. H. Field, counsel for the appellant, and by Messrs. J. R. Smead, Assistant United States Attorney, and D. F. McGowan, Assistant to Solicitor, Department of Agriculture, counsel for the United States of America, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the second day of November in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Directing Filing of Opinion, etc.

ORDERED, that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the Minutes of this Court in said cause in accordance with said opinion.

[Opinion U. S. Circuit Court of Appeals.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

F. M. DUDLEY, H. H. FIELD and GEO. W. KORTE, for Appellant.

J. L. McCLEAR, United States Attorney.

J. R. SMEAD, Assistant United States Attorney.

D. F. McGOWAN, Assistant to the Solicitor, Department of Agriculture.

On March 21, 1905, the Commissioner of the General Land Office made and published an order temporarily withdrawing from sale, pending a decision of the President as to the advisability of creating a National Forest Reserve, a large body of vacant, unappropriated public lands situate in the State of Idaho, and on November 6, 1906, the President, by proclamation, set apart as a public reservation, with the exception of some minor tracts, the lands thus

temporarily withdrawn, to be known as the Coeur d'Alene Forest Reserve.

On October 23, 1906, the defendant filed in the United States Land Office at Coeur dAlene, Idaho, its profile, survey and plat of a proposed right of way for a railroad through the reserve, traversing certain subdivisions particularly specified.

On March 20, 1907, the defendant filed in the local land office an amended map and profile changing the proposed route of its right of way, and the previous map was returned from the General Land Office without approval by the Secretary of the Interior.

On May 10, 1907, the defendant filed in the local land office another amended map and plat of its proposed right of way through the reserve, differing from the last, and, in accordance with the practice, the first amended plat was also returned without approval.

On the same day the defendant, desiring immediate permission to begin construction of its railroad, acting through its general counsel, George R. Peck, entered into the following agreement in writing with the Acting Forester of the Forest Service:

"WHEREAS, The Chicago, Milwaukee and St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the Company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as

nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

Dated May 10, 1907.

(Signed) "GEO. R. PECK."

This agreement was indorsed:

"Approved and advance permission given to construct, subject to ratification hereof by the Company.

Date May 10, 1907.

JAMES B. ADAMS, Acting Forester."

In pursuance of such agreement, defendant was permitted to and did at once enter upon the construction of its railway over and across the lands of the Coeur d'Alene Forest Reservation, and so continued until the road was completed; but in the meanwhile, on December 3, 1907, defendant informed the Forester that it ought not to be required to file any stipulation whatever.

After entering into the agreement, the Secretary of Agriculture drafted a stipulation, and requested defendant to enter into and execute it, and on August 14, 1908, the Secretary of the Interior demanded of the defendant that it comply with the requirements of the Secretary of Agriculture as a condition precedent to the approval of defendant's map of May 10, 1907. The defendant refusing to comply with such condition, the map was, on October 29, 1908, rejected and taken from the files of the Department of the Interior, and returned to defendant without approval by the Secretary.

The United States for its bill of complaint sets

up these facts, and further shows, in effect, that on February 11, 1904, the Secretary of the Interior publicly promulgated certain regulations and conditions designed for the protection of the public interest respecting forest reservations, setting out such as are thought to have relation to the present controversy; that the stipulation prepared by the Secretary of Agriculture was as nearly as practicable like the stipulation referred to in the Peck agreement; that the defendant has, without regard to the terms and conditions of the stipulation agreed to be entered into, and wholly in disregard of the rules and regulations prescribed and required by the Secretary of Agriculture and the Secretary of the Interior for the protection of forest reserves, cut large quantities of timber upon the reserve, and has destroyed and is destroying and causing to be destroyed large quantities of young timber, has thrown and deposited great quantities of rock, earth, gravel, and debris in the Saint Joseph River, thereby obstructing its navigation and rendering it unfit for use in driving logs, and has set and caused to be set fires along the right of way, which have escaped from control and destroyed other timber on the reserve; all to the great damage of plaintiff; that the defendant has been repeatedly warned against its acts of trespass and waste committed contrary to the terms of the proposed stipuluation and the rules and regulations of the Department, but has wholly disregarded said warnings, and openly threatens and intends to continue such disregard of the requirements of the proper authorities of the Government.

The bill prays that defendant be required to enter into the proposed stipulation, to cease obstructing Saint Joseph River and trespassing upon the reserve, and to discontinue constructing or operating its railroad within said reserve until it shall have executed and filed with the Secretary of the Interior the required stipulation and complied with the rules and regulations pertaining to forest reserves; for damages for cutting timber, etc., and for former relief.

Exceptions to the bill and a demurrer were interposed and denied.

The answer controverts the legal effect of the temporary withdrawal order of the Secretary of the Interior of March 21, 1905, as it pertains to the matters in suit; also the authority of that officer to promulgate the rules and regulations prescribed by the order of February 11, 1904; and avers that on February 17, 1906, the Secretary of the Interior accepted for filing and duly filed due proofs of the defendant company's organization, made in pursuance of the Act of Congress of March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States," but did not accept the map of location of its proposed railroad, being the same as filed in the local land office, as alleged in the bill of complaint. The answer also controverts the alleged purpose and effect of the Peck agreement, or that defendant in pursuance of said agreement entered into possession of the right of way for advance construction of its rail-

road through the reserve, but admits that defendant through its general counsel informed the forester that it ought not to be required to file any stipulation in the premises.

Further answering, the defendant avers that long prior to the proclamation of November 6, 1906, it had, by virtue of the provisions of the act of March 3, 1875, and compliance therewith, acquired and become vested with all the rights, privileges and authorities conferred and to be conferred by said act, and thereby was entitled to take for its railroad a right of way and to construct its road thereon, and to take from the public lands material, earth, stone, and timber necessary for construction purposes, without payment to the Government, all without regard to any rights claimed to have been conferred by the agreement of March 10, 1907; that such agreement was wholly without consideration, and, further, that the Peck agreement was entered into under a mistake of fact on the part of both the United States and the defendant as to the rights the defendant had acquired for construction of its railroad across the reserve under the act of March 3, 1875, prior to the proclamation of the President setting aside such reserve. But without this, it is further averred that the defendant has the right to the benefits of the act of March 3, 1875, without payment of compensation of any kind to the United States; and that for the foregoing reasons the defendant has refused to ratify or confirm the Peck agreement of May 10, 1907.

The answer further calls in question the reasonableness of the terms and conditions of the stipulation prepared by the Secretary of Agriculture, and known as Exhibit "G," as to whether it is as nearly as practicable in conformity to the conditions of the stipulation entered into with respect to the Helena Forest Reserve, and controverts the authority of the Secretary of the Interior to prescribe such or any conditions or impose the same upon the defendant. It admits the cutting of timber, but denies liability, and denies obstruction of the Saint Joseph River, and all liability for destruction of timber by fire. Lastly, it is averred that defendant constructed its road over the reserve with full knowledge on the part of the United States that defendant had not ratified the Peck agreement, and that it had so and continuously refused to ratify the same, and that by reason thereof the plaintiff is estopped now to insist that defendant execute the stipulation referred to in such agreement.

After a hearing upon the evidence, the Court pronounced in favor of the plaintiff, and the defendant appeals.

WOLVERTON, District Judge:

The primary contention hinges largely upon the purposes and intendment of the act of March 3, 1875 (18 Stat. 482), and later acts respecting forest reserves.

By the first section of the act of 1875 a right of way through the public lands of the United States is granted to any railroad company, organized under

the laws of any State, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the center line of said railroad; also the right to take from the public lands adjacent to the line of road material, earth, stone, and timber necessary for the construction of the road; also ground adjacent to such right of way for station buildings, depots, machine-shops, side-tracks, turnouts, and water stations, not to exceed in amount 20 acres for each station, to the extent of one station for each ten miles of road. Section 4 provides:

"That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

And section 5:

"That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by

treaty stipulation or by Act of Congress heretofore passed."

Under an act entitled "An act to repeal timber-culture laws, and for other purposes," adopted March 3, 1891, the President of the United States was authorized to set apart and reserve, from time to time, in any State or Territory having public land bearing forests, any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; the same to be by public proclamation declaring the establishment of such reservations and the limits thereof. (26 Stat. 1103). By a clause contained in an act making appropriations for sundry civil expenses of the Government for the year 1897, adopted June 4, 1897, the Secretary of the Interior is authorized to make provision for protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside, or which might thereafter be set aside under the act of March 3, 1891, and to make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction. By the same act, the Secretary of the Interior is authorized and empowered, under such rules and regulations as he may prescribe, to sell and dispose of the dead timber and matured and large growth trees found upon such reservation (30 Stat. 35); and the President is authorized to modify executive orders establishing forest reserves, and

to vacate the same altogether (30 Stat. 36).

By another act making appropriations to provide for deficiencies, adopted March 3, 1899, this clause was inserted, namely:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby." 30 Stat. 1233.

For some time prior to the adoption of the act of March 3, 1875, it had been the policy of the General Government to grant by special acts rights of way for railroads over the public lands, and these carried their own terms and conditions. No doubt believing the purpose could as well be subserved by a general act, Congress adopted the act of 1875.

Much discussion is indulged in respecting the meaning and legislative significance of the words "public lands," as contained in section 1 of the act, but we are not impressed that it is necessary to enter at all upon that inquiry, as we believe that section 5 affords a sufficiently clear interpretation of the statute for the purposes of this case. That section makes the act inapplicable to any lands within the limits of any military park or Indian reservation, or other lands specifically reserved from sale. It is the cardinal policy and purpose of Congress and the General Government that the lands comprised within forest reservations shall be specially reserved from sale and disposal to settlers

and other persons, except as more recently expressly provided by law, while such reservations remain unrevoked by direction or order of the President. As said in Shannon v. United States, 160 Fed. 870, 873:

"The creation of such a reservation severs the reserved land from the public domain, disposes of the same, and appropriates it to a public use."

Nor does it seem to us that the rule *ejusdem generis* helps the respondent, for national forest reserves are set apart for a definite, permanent and public use, the same as are military, park and Indian reservations, only that the use is different. So is the use of a military reserve different from that of a park reserve or an Indian reservation, and an Indian reservation from that of a part, but all are created and set apart for special governmental use. And a forest reserve, under the conservation policy of the Government, is just as essential and vital to the effectuation of the Government's purposes in that direction as a military reserve, a park, or an Indian reservation for the purposes of the Government to the ends for which they are respectively established.

"Congress establishes a forest reserve for what it decides to be national and public purposes."

Light v. United States, 220 U. S. 532, 537.

Congress by later enactments has so interpreted the act. This is evidenced by an act of July 8, 1898 (30 Stat. 729), and another of January 10, 1899 (30 Stat. 783). The first of these acts grants a right of way to the Cripple Creek Short Line Railway

Company through the Pikes Peak Timber Land Reserve, "subject to the rules and restrictions and carrying all the rights and privileges" of the act of March 3, 1875, but providing "that no timber shall be cut by said railroad company for any purpose outside of the rights of way," thus impliedly recognizing that the act of March 3, 1875, was without application to a forest reserve. Otherwise it would seem that Congress would not have specially made applicable the rules and restrictions of said act, and declared that all the rights and privileges thereof should be read into the act then adopted. Again the provision touching the cutting of timber outside of the right of way was a restriction upon the act of 1875.

The second act (January 10, 1899), grants the right of way to the Saginaw Southern Railroad Company through the San Francisco Mountains Forest Reserve, a reserve set apart and established by President McKinley, "said right of way being granted subject to the rules and restrictions and carrying all the rights and privileges" of the act of 1875.

It must have been the view of Congress that without these enabling acts a railroad company had no right, under the act of 1875, to cross forest reserves; otherwise there was no need of their enactment.

For other acts of like nature see Acts of May 28, 1896 (29 Stat. 190), June 6, 1896 (29 Stat. 253), May 18, 1898 (30 Stat. 418), and February 28, 1899 (30 Stat. 910).

So also is the act of March 3, 1899, in full recogni-

tion of the same thought. In form provided by existing law, the Secretary of the Interior is authorized to approve surveys and plats of rights of way for railroads across any forest reservation, thus delegating the power that Congress formerly exercised in that respect to the Secretary of the Interior.

Judicial interpretation, so far as authorities have been cited in the same way.

United States v. Bailey, 178 Fed. 302.

We may next inquire whether the defendant company acquired a right of way under the act of 1875 prior to or pending the setting aside and establishment of the Coeur d'Alene Forest Reserve.

To recall the pertinent facts: The Commissioner of the General Land Office temporarily withdrew from sale and disposal the lands comprised in the reserve March 21, 1905. On February 17, 1906, due proofs of the company's organization, under the laws of the State of Idaho, were by the Secretary of the Interior accepted and filed in his Department. On October 23, 1906, the defendant filed in the local land office its profile, survey and plat of its proposed right of way through the reserve. An amended map was filed March 20, 1907, and a second amended map May 10, 1907. The first two of these plats were returned from the General Land Office when the amendments were presented for approval, and the last was finally taken from the files also without approval by the Secretary of the Interior. Previous, however, to the filing of either of the amended maps, namely, on November 6, 1906, the President by his proclamation finally established the reserve. Thus it will be seen that initiatory steps had been taken

to create the Coeur d'Alene reservation before the defendant was even organized, and long before it attempted to file any map or profile of the location of its right of way across the reserve, and the company twice amended its map of survey and final location after the President had issued his proclamation finally establishing the reserve, changing its route in material particulars each time.

The Secretary of the Interior has long exercised the authority of withdrawing specific lands from settlement and sale. Especially has this been so with respect to withdrawals to satisfy the requirements of land grants for railway and other purposes. These withdrawals operate effectively to prevent the inception of any right under the pre-emption and homestead laws.

Hamblin v. Western Land Company, 147 U. S. 531, and cases cited.

But a withdrawal by the head of a department is tantamount to a withdrawal by the President. The executive acts through the heads of departments, and their acts in many of the larger affairs of state are his acts. In an early case in the Supreme Court (Wilcox v. Jackson, 13 Pet. 498), it appears that the Secretary of War requested the Commissioner of the General Land Office to direct a reservation of lands to be made, and one was accordingly made, for military purposes, and the act of the Secretary of War in this respect was held to be the act of the President.

In another case (Wolsey v. Chapman, 101 U. S. 755), where the Commissioner of the General Land

Office directed the registers and receivers of the local land offices to withhold from sale all odd-numbered sections within a described area, the Supreme Court, speaking through Chief Justice Waite, applies this reasoning:

"If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect."

The reasoning is apt as it respects the case at bar. The Commissioner of the General Land Office by order withdrew the lands comprised within the reserve from sale and disposal, and although it was pending an investigation as to what lands should be finally included within a reserve, it was in effect the act of the President and tantamount to an executive order for that purpose, so that thenceforth the land was especially reserved from sale. This in itself would seem sufficient to preclude the defendant from the acquirement of a right of way over the reserve under the act of 1875.

But it has been further established, and by recent cases, that the grant to railroad companies under the act of 1875 may take effect in two ways: First, upon

a construction of the road; and, second, upon the approval of the Secretary of the Interior after the definite location and filing of a profile of the road in the local land office. Jamestown and Northern Railroad Company v. Jones, 177 U. S. 125; Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Doughty, 208 U. S. 251. It was held in the latter case that a valid homestead entry, made after final survey but before either the construction of the road or the approval by the Secretary of the Interior of the profile, is superior to the rights of the company in acquiring the right of way.

Neither of the conditions ascertained by these cases was complied with by defendant prior to the temporary withdrawal; not were they wholly complied with prior to the proclamation of the President finally setting aside and establishing the reserve. True, the railroad company had organized, and had filed with the Secretary of the Interior due proofs of such organization, and had also filed in the local land office a survey and plat of its proposed right of way through the reserve prior to the President's proclamation, but that map and plat lacked the approval of the Secretary of the Interior, so that when the reserve was established the company had not acquired its right of way under the provisions of the act of 1875.

It is urged that the cases last cited pertained to the correlative rights of the parties as between the railroad company and the settler, and that the doctrine announced ought not to apply as between the railroad company and the Government. And in

this relation it is further urged that when the right of way was finally located the company took title thereto by relation back to the time of making due proofs of organization and filing such proofs with the Secretary of the Interior. This under the doctrine as promulgated touching grants of lands to railway companies, that when the location of a road is finally established the grant takes effect by relation back to the date of the grant, and by a fiction of law the grant is called one *in praesenti.* As said in Railway Company v. Alling, 99 U. S. 463, 475:

"When such location and appropriation were made, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant."

See. also, Schulenberg v. Harriman, 21 Wallace, 44; Van Wyck v. Knevals, 106 U. S. 360.

The grant was termed a float in the meanwhile, but the title passed to no specific land because it lacked identification. But the analogy to the present case is not apparent. Here counsel would treat the right of way as a float when the right of way is dependent absolutely upon its own definite location. It is not a grant of lands dependent upon a location of the road, but a right of way dependent upon its own location. No preliminary or other location is indicated by the proofs of organization. Article 8 of the Articles of Incorporation indicates that the company intends to construct a road from some point to be located on the east boundary line of the State of Idaho, between the 46th and 57th degrees of North Latitude, thence extending in a general westerly

direction to some convenient point to be located on the west boundary line of the State. To call the right of way dependent upon such a designation of the probable termini and route of the road a float would manifestly be a palpable misnomer. It could not by any stretch of the imagination be so termed. As was said in Jamestown and Northern Railroad Co. v. Jones, *supra:*

"Different considerations apply to the grant of lands than to the grant of the right of way."

While the filing of proofs of organization authorizes the railroad company to locate its right of way over public lands, it acquires no particular route or right of way until it has either actually constructed its road or complied with section 4 in locating, filing, and having approved the profile of its right of way; and this applies as between the railroad company and the Government. Indeed, in a later case—Stalker v. Oregon Short Line, 225 U. S. 142, 151, the Supreme Court interprets what was said in the opinion of the Court in Railway Company v. Doughty about the grant of the right of way being dependent upon three things, naming them, as referring "to the nonvesting of any right as against the United States, and not as denying the priority of right in the acquisition of the premises as between parties growing out of priority of application."

We see no escape from the conclusion that the Government's establishment of the reserve is paramount that the lands comprised thereby were especially reserved from sale, and that the defendant railway company failed in the acquirement of a

right of way for its railroad across the reserve in pursuance of the act of 1875.

It being ascertained that a forest reserve is excepted from the operation of the act of March 3, 1875, and that the defendant railroad company did not, by what it did, acquire a right of way over the Coeur d'Alene Reserve prior to its establishment through withdrawal of the lands comprised therein from sale by the Commissioner of the General Land Office and by the proclamation of the President, it remains to be seen by what authority, right, or method a railroad company may acquire such right of way.

The Government's position is that the act of March 3, 1899, not only affords the means by which such a right of way may be acquired, but that it is potent to authorize the Secretary of the Interior to prescribe rules and regulations to be observed and the conditions, within reasonable bounds, upon which a railroad company may obtain the privilege contemplated.

The act provides that in form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a railroad over and across any forest reservation, when in his judgment the public interests will not be injuriously affected thereby. It is somewhat obscure, and just what Congress intended to accomplish by its adoption is not readily apparent; but one thing seems to be of clear intendment, and that is that the Secretary of the Interior shall only file and approve surveys and plats of rights of way when in

his judgment the public interests will not be injuriously affected. In other words, the Secretary of the Interior is made the arbiter as to when such surveys and plats shall be approved, and without such approval it is plain that a railroad company cannot acquire a right of way across a forest reserve. If in his judgment the public interests would be injuriously affected, it would seem he could prevent, by refusal to approve the surveys and plats, any occupation of the reservations for right of way purposes. Having the power to prevent, it would seem to follow that he also has the power to approve surveys on conditions that would provide against threatened injury to the public interests, and also afford relief and reimbursement against such as might actually be sustained.

Acting upon this principle, the Secretary of the Interior has, for the exercise of his judgment in the premises, heretofore adopted and promulgated certain rules and regulations and prescribed certain conditions calculated to safeguard the public interests in that regard. These require of the applicant for a right of way a stipulation that the right of way shall not be so located as to interfere with the proper occupation of the reservation by the Government; that the applicant will cut no timber outside of the right of way; that he will remove no timber within the right of way, except as rendered necessary by the proper use and enjoyment of the privilege; that he will remove from the reservation, or destroy under proper safeguards, all standing, fallen or dead timber, etc., for such distance on each side of the central

line as may be determined by the General Land Office to be essential to protect the forest from fire, and will also furnish men and materials for fighting fire, if it can be done without serious injury to applicant's business.

Such rules and regulations also require the application to execute a bond to the Government, conditioned that the makers thereof will pay "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur."

No construction can be allowed until an application for the right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered and permission specifically given.

The regulations have since been changed so that the applicant must enter into stipulation and execute such bond as the Secretary of Agricultural may require for the protection of such reserves.

Now, referring to the authority expressly conferred upon the Secretary of the Interior by the act of June 4, 1897, to make rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction, thus delegating to such department a broad scope of regulation touching forest reservations, it would indicate that when the act of 1899

was adopted, Congress assumed that the Secretary already had ample power and authority to regulate by rule and the imposition of proper conditions the occupation generally of forest reserves, and the especial purpose of that act was to render the power specific as respects occupation for right of way for railroad purposes; hence the peculiar wording of the act.

The authority accorded the Secretary of the Interior to exercise his judgment for the conservation of the public interests respecting forest reserves carries with it, by strong implication, the authority to make rules and regulations for the better and more efficacious exercise of his judgment. The act of adopting such rules and regulations is not legislative, but merely administrative for enforcing the law, specially given into his charge to provide ways and means for its due execution and enforcement. In general, the power to make rules and regulations must be granted expressly or by necessary implication; otherwise it cannot be lawfully exercised.

Van Lear v. Eisle, 126 Fed. 823, 827.

But we think in the present case the power exercised by the Secretary of the Interior in making the rules and regulations in question, and to prescribe the conditions imposed, is clearly implied by the terms of the statute in view of the previous legislation pertaining to the conservation of forest reserves.

The conclusion thus deduced touching the power and authority of the Secretary of the Interior respecting the forest reserves, and the approval of

surveys and plats of rights of way across such reserves, affords ample consideration for upholding the Peck agreement, for the agreement was entered into upon the condition that the defendant company should have immediate permission from the Forest Service to begin construction of its railroad through the reserve.

This brings us to the contention of appellant that the respondent is not entitled to equitable relief.

The purpose of the bill of complaint is to require specific performance of the Peck agreement in that the defendant company shall execute and abide by stipulations and conditions to be prescribed by the Forester in respect of defendant's railroad, such stipulations and conditions to be as nearly as practicable like those executed by the defendant company on January 18, 1907, with relation to its railroad within the Helena National Forest, Montana, and further that the defendant company shall respond in such damages as the plaintiff has sustained in the meantime by reason of the defendant's construction of its railroad across the reserve and occupation of the right of way therefor.

Specific performance is a well-established head of equitable jurisprudence, and it is wholly unnecessary to cite authority to that purpose. The several objections assigned as to why the bill is without equity may be disposed of *seriatim.*

It is first urged that there was no authority vested in the executive department to consent to a railway company which was not a qualified beneficiary under the act of 1875 entering upon the public lands for

the purpose of constructing a railroad thereon. This objection is disposed of by what has been previously determined as to the power and authority of the Secretary of the Interior to approve surveys and plats of rights of way over the forest reservations.

So also has the objection been disposed of that there was no consideration for the promise embodied in the agreement.

The third objection is that the undertaking is an agreement to make an agreement, and that specific performance of such an engagement will not be decreed. This is the general rule, no doubt. But contracts of insurance and indemnity and agreements for the execution of formal contracts of security constitute well settled exceptions to the general rule. 36 Cyc. 567. The stipulation agreed to be executed is in the nature of a contract to indemnify and save harmless the United States, and as further security against any damage that might result from the construction of defendant's railroad and the occupancy of the right of way across the reserve for railroad purposes.

The fourth objection is that the stipulation demanded in the bill is not essentially the same as the one agreed to be executed under the Peck agreement. Some reference to the pleadings and the facts is necessary to an understanding of the situation. Prior to the institution of the suit the Secretary of Agriculture prescribed a form of stipulation, a copy being attached to the bill of complaint and marked Exhibit "G." A copy also of the stipulation entered into relative to the Helena Forest Reserve is

found in the evidence. A comparison of these two documents indicates a material difference between them, and while the Court is not disposed to require an execution of Exhibit "G," we think complainant is entitled to an execution on the part of the railroad company of a stipulation "as nearly as practicable like" the one executed January 18, 1907, respecting the Helena Forest Reserve. The scope of the relief prayed is broad enough to require an execution of the stipulation, if the plaintiff is otherwise entitled to equitable relief.

It is further urged in this relation that the plaintiff made no tender of any stipulation, approximating as nearly as practicable the Helena stipulation, for defendant's execution. This was unnecessary under the facts developed, as in the end the defendant declined to sign any stipulation as required by the Peck agreement.

The next objection is that the Peck agreement is too uncertain for specific performance. That is certain which is capable of being rendered certain. The Helena contract was touching the approval of a survey and plat of a right of way across a reserve under conditions similar to those obtaining in respect to the Coeur d'Alene Reserve, and it was manifestly not a difficult task to suit the stipulation to the slight difference in conditions that really existed. The controlling features were practically the same in each case. We therefore deem the Peck contract susceptible of specific performance.

Hebert v. Mutual Life Ins. Co., 12 Fed. 807.

The next objection is that the Peck agreement is

lacking in mutuality. Peck was the general counsel of the defendant railroad company, and unquestionably authorized, in furtherance of its purpose in acquiring a right of way across the Coeur d'Alene Reserve, to enter into just such an agreement as he did. In implicit reliance upon said agreement, and in full pursuance of its intendment, the plaintiff, acting through its duly authorized officer, granted immediate permission to enter upon the construction of its railroad across the reserve, and this prior to any approval of the surveys and plat of the company's right of way. Having entered upon the construction of its railroad, the defendant so continued without interference on the part of the Government until the latter part of November, 1907, when the stipulation Exhibit "G" was presented for execution. Execution was declined pending certain negotiations in Washington, D. C., and in the meanwhile the defendant was allowed to continue in its construction without compliance with the requirements of the Forest Service, and it so continued to proceed with the work until it had fully completed its construction work for the full distance across the reserve, and is now in the operation of its railroad.

The outcome of the controversy is this suit, called a friendly suit to determine the correlative rights of the parties litigant.

The agreement was wholly executed on the part of the Government the moment it granted permission to the defendant to enter upon construction. If not then, it has since been so amply executed that there can no longer be any question about it. Want

of mutuality cannot be predicated of an agreement wholly executed by the party seeking specific performance. Mississippi Glass Co. v. Franzen, 143 Fed. 501. In this case is found a quotation from Grove v. Hodge, 55 Pa. 504, 516, which states the doctrine explicitly as follows:

"Want of mutuality is no defense to either party, except in cases of executory contracts. It has no applicability to an executed bargain. There are many where the obligation is all upon one party. As to one the obligation was fulfilled, the contract was executed, when it was made. As to the other party, it remained executory. A consideration may be either something done, or something to be done, or a promise itself. When it is something already done, it is idle to talk of want of mutuality. That is to be considered only when the obligations of both parties are future."

But counsel insist that advance permission was given subject to ratification by the company, and that the company has never ratified the Peck agreement. It has, however, availed itself to the fullest extent of the very advantages which it sought to acquire, and did acquire, by virtue of the agreement. While delaying express ratification, it continued in the exercise and enjoyment of the right and privileges extended in pursuance of the agreement until it got absolutely everything it wanted, and now seeks, through the instrumentality of a friendly suit, to have the agreement declared nonenforceable because not ratified by it. It is too late, after enjoying the full benefits extended under the agreement, to insist

now that defendant should not be required to perform because it has not expressly ratified such agreement.

It is further suggested that the defendant company had no knowledge of the agreement until Exhibit "G" was presented for execution. But this knowledge is imputed from the fact that the agreement was executed by the general counsel of the company, and, having been done in the line of his authority and in pursuance of an explicit duty enjoined, the company is bound to know what he did in that relation.

Another objection is that the agreement was signed under a mistake of fact on the part of Mr. Peck. But this cannot go to the sufficiency of the bill, as it is set up as a defense, and is to be determined upon the evidence adduced. The trial court has found against the defendant on the issue, and we approve the findings in that respect.

We think it clear that the bill states facts pertinent and sufficient to entitle the plaintiff to specific performance of the Peck agreement.

Again, it is insisted that the bill is multifarious, and that a court of equity is without jurisdiction to award money damages. Several items of damages are claimed, such as for obstructing St. Joseph River with debris, for timber destroyed by fire, caused by the escape thereof through want of proper precautions, and for timber cut in clearing the right of way. But it is urged that these items are each and all subjects for actions at law, and having been combined in a demand for relief in one bill render the bill

multifarious. A court of equity having acquired jurisdiction for one purpose may generally award incidental relief, although such relief may be legal rather than equitable. All these demands for damages are merely incidental to the main suit for specific performance of the Peck agreement, and equitable jurisdiction is clear to afford entire relief in one suit.

The idea of the bill is to require due execution of the stipulation and bond, as contemplated by the Peck agreement, and to recover what damages the Government has suffered in the meantime, in pursuance of the stipulation and bond had they been given as agreed. Whatever damages might arise in the future would be provided against by the stipulation and bond executed under the decree of the court.

In this view of the case, the damages prayed are but incidental to the main suit, and the bill is therefore not multifarious.

The trial Court directed a form of stipulation to be entered into, one which the parties themselves had agreed to after the main decision was rendered, with an additional provision that it should be effective as of date May 10, 1907, and awarded damages in the aggregate of $68,489.

Being of the opinion that no error was committed, the decree of the District Court is affirmed, and it is so ordered.

[Endorsed]: No. 2351. United States Circuit Court of Appeals for the Ninth Circuit. Opinion. Filed Nov. 2, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Decree U. S. Circuit Court of Appeals.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the District of Idaho, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: No. 2351. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee and St. Paul Railway Company of Idaho, etc., vs. United States of America. Decree. Filed and entered Nov. 2, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, of Idaho, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Notice of Appeal [to Supreme Court U. S.]

The above-named appellant Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation, conceiving itself aggrieved by the decree entered in the above-entitled cause on the 2d day of November, A. D. 1914, in the above-entitled court, affirming with costs the decree entered against the said appellant and in favor of the said appellee on the 11th day of June, A. D. 1913, in the United States District Court for the District of Idaho, Northern Division, ordering and decreeing that said appellant should, within thirty (30) days from said June 11, 1913, deliver unto said Court the duplicate maps of its definite location through the Coeur d'Alene Forest Reserve, being the maps filed in the United States District Land Office at Coeur d'Alene, Idaho, May 10, 1907, and also within said thirty (30) days to execute and deliver unto the Court a certain stipulation in said decree set forth, and also that the said appellee should have and recover from the ap-

pellant the sum of sixty-eight thousand four hundred eighty-nine dollars ($68,489.00), together with costs, does hereby appeal from said decree and from each and every part thereof to the Supreme Court of the United States; and prays that this, its said appeal, may be allowed and that a transcript of the record, proceeding and papers upon which said original decree of affirmance was made, together with all additional proceedings and papers in the said United States Circuit Court of Appeals duly authenticated may be sent to the said Supreme Court of the United States, at Washington, D. C.

The said appellant tenders and files herewith an assignment of the errors which it conceives were

Docketed. No. 2351. United States Circuit Court committed in the affirmance of such decree.

H. H. FIELD,
F. M. DUDLEY,
Solicitors for Appellant.

[Endorsed]: Notice of Appeal to Supreme Court U. S. Filed Apr. 29, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Assignment of Errors and Prayer for Reversal.

The above-named appellant specifies and assigns as errors committed by the Court in its affirmance of the decree of the United States District Court for the District of Idaho, Northern Division, the following, to wit:

(1) The said United States Circuit Court for the District of Idaho, Northern Division, erred in denying the exception, upon the ground that such matter was impertinent, filed by appellant to the following matter contained in the 10th paragraph of the bill of complaint beginning at about the 12th line after the first series of land descriptions contained in said paragraph, namely:

> "And has thrown, rolled and deposited, and is throwing, rolling and depositing great quantities of rock, earth, gravel and debris in the St. Joseph River in divers places, adjacent to said pretended right of way, whereby the St. Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log driving, and will continue to be unfit and useless for purposes of navigation and log driving until said rock, earth, gravel and debris is removed therefrom."

And the said United States Circuit Court of Appeals erred in affirming the order of the said United States Circuit Court denying such exception.

(2) The said United States Circuit Court for the District of Idaho, Northern Division, erred in

overruling the demurrer to the portion of said bill set forth in Assignment No. 1, which demurrer was interposed upon the following specified grounds, namely: (a) that the said complainant had no interest in said matter; (b) that the said defendant was not answerable as to said matters to the said complainant but to the State of Idaho; and (c) that the said complainant was not entitled to any relief with respect to said matters.

And the said United States Circuit Court of Appeals erred in affirming the order of the said United States Circuit Court overruling such demurrer.

(3) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objections to the questions propounded to the witness Dorr Skeels as to the navigability for logs of the East Fork and Little North Fork streams and in admitting over said objections and considering the testimony given by said witness in response to such questions, for the reason that said testimony was irrelevant, immaterial and incompetent under the issues in this case.

The substance of the testimony to which this assignment relates is as follows:

> "Coming down the river from the junction of the Little North Fork and East Fork, the first obstruction of which I prepared a memorandum was in the river at a point a little above the east portal of Tunnel No. 30 in the SE. ¼ of sec. 7, tp. 46 North, Range 6 East. The rock at that point was thrown into the creek, filling the chan-

nel completely from bank to bank at the normal stage of water and backing the water for a distance of about 200 feet. The next obstruction coming down the river was at the east portal of Tunnel No. 31 on the line between sections 7 and 18, partly in each section, Tp. 46 N., R. 6 East. The boulders and broken rock were thrown from the right of way into the channel so as to completely fill it and back the water into the stream for a considerable distance, making log-driving impossible. The next obstruction of which I have any memorandum was at the west portal of No. 31 in the NE. ¼ of Sec. 18, Tp. 46 N., R. 6 E. Boulders and broken rock were thrown from the fill at the portal of the tunnel into the channel of the stream so as to completely fill it and back the water into the stream for a distance of several hundred feet, making log-driving impossible. The next obstruction was from 100 ft. to 200 ft. below the west portal of Tunnel No. 32 in the SW. ¼ of Sec. 18, Tp. 48 N., R. 6 E. The rock fills the channel of the creek for 200 ft. along its course and has already formed a big jam of driftwood above it, the rock in the stream rendering log-driving impossible. The next point was at the west portal of No. 33 in Sec. 24, Tp. 46 N., R. 5 E. The rock was thrown down along the base of a large fill, filling the creek channel completely with broken rock for a length along the creek of 250 ft., blocking up the water for 700 ft. above the obstruction, rendering log-driving impossible. All of the

distance for which the water is backed and the reference to filling the stream is at the normal stage of water. The next obsctruction is about three-eighths of a mile and below the west portal of Tunnel No. 33 in SE. ¼ of Sec. 46 N., R. 5 E. Several large masses of rock ten to twenty feet in diameter have been thrown into the creek and filled its bed for a width of fifty feet, rendering the stream unfit for log-driving. The next obstruction is a short distance above the east portal of Tunnel 34, SW. ¼ of Sec. 25, Tp. 46 N., R. 5 E.; several large boulders from 8 to 16 ft. in diameter have been thrown in from the right of way into the creek forming a complete obstruction to log-driving. The next obstruction was about a mile from Avery where the creek channel has been completely filled by a fill made to form a right of way and the channel of the creek destroyed and thrown into the surrounding country to make its own channel.

The railroad ran along the course of the river and they built the fill out to fill the river, throwing the stream out over the lower bank to cut its way around the fill.

I know of my own knowledge that these obstructions were made by the Chicago, Milwaukee & St. Paul Railroad Company of Idaho.

The Government has more than 2,000,000 ft. of merchantable timber on the waters of this stream above the rock obstructions to which I have testified.

For more than half of this timber the sole means of transportation is by the North Fork of the St. Joe River. For the remaining part of the timber which I mention, the best and cheapest method of transportation is by the North Fork of the St. Joe River, although it might at great cost be gotten up to the right of way and loaded on the railroad and transported in that manner."

NOTE: All testimony concerning the condition of the River and obstructions therein was received subject to appellants objection that there was no equity in such matters and that such evidence was incompetent and immaterial under the issues in this case. These objections were included in the specifications of objections to the admission of evidence filed in the District Court but upon which the Court made no specific ruling. It, however, considered and gave effect to such objectionable testimony in the opinion filed and in the decree.

And the United States Circuit Court of Appeals erred in sustaining the action of the said United States District Court with respect to such objections and objectionable testimony.

(4) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objecton to the interrogatories propounded to the witness Rutledge relative to the condition of the St. Joe River and its tributaries, which objection was upon the ground that such matter was incompetent under the issues in this case and that any damages, if the navigability

of the stream was impaired, would be properly the subject of an action at law and could not be gone into in this suit in equity.

The witness Rutledge, notwithstanding the defendant's objections, gave testimony of the same character and import as that of the witness Skeels relating to the depositing of rock and debris in said river and its tributaries.

And the said United States Circuit Court of Appeals erred in sustaining the action of said District Court with respect to such objection and objectionable testimony.

(5) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objection to the interrogatories propounded to the witness Hamilton relative to the condition of the North Fork and other streams and their suitability for driving logs, which objection was interposed upon the ground that such matter was incompetent under the issues in this case and afforded no ground for equitable relief.

The witness Hamilton, notwithstanding defendant's objections, gave testimony of the same general character and import as the testimony of the witness Skeels relating to the depositing of rock and debris in said river and its tributaries.

And the said United States Circuit Court of Appeals erred in sustaining the action of said District Court with respect to such objection and objectionable testimony.

(6) The United States District Court for the District of Idaho, Northern Division, erred in finding

that the plaintiff was entitled to recover of the defendant the sum of $5,500, on account of rock and other debris thrown into the St. Joe River and its tributaries.

And the said United States Circuit Court of Appeals erred in affirming such finding by the said District Court.

(7) The said United States Circuit Court for the District of Idaho, Northern Division, erred in overruling a demurrer interposed by the defendant to the following portion of the bill of complaint herein, namely:

> "To so much of said bill as charges that this defendant, through lack of proper precaution against fire, has set and caused to be set numerous fires along, upon and adjacent to said pretended right of way, and has thereby burned and destroyed, and caused to be burned and destroyed, a large amount of timber, young growth and seedlings, to wit: 4,045.700 feet board measure of merchantable timber and 1,344½ acres of seedlings upon the land specifically described in said bill of complaint";

which demurrer was interposed upon the specified ground that there was no equity in such matter and that the said complainant had as to such matters a plain, speedy and adequate remedy at law.

And the said United States Circuit Court of Appeals erred in affirming the order of the said Circuit Court overruling such demurrer.

(8) The said United States Circuit Court for the District of Idaho, Northern Division, erred in over-

ruling the demurrer to the following portion of the bill of complaint herein, namely:

> "To so much of said bill as charges that this defendant is setting and causing to be set fires along, upon and adjacent to said pretended right of way; and is burning and destroying and causing to be burned and destroyed, great quantities of timber, young growth and seedlings to the damage of said complainant,"

which demurrer was interpose upon the assigned grounds that there was no equity in such matters, that as to such matters, if true, there was a plain, speedy and adequate remedy by the ordinary process of law; that said acts, if done unlawfully or intentionally, were punishable by indictment and under the laws of the United States defining and providing for the punishment of misdemeanors and felonies.

And the said United States Circuit Court of Appeals erred in affirming the order of the said United States Circuit Court overruling said demurrer.

(9) The said United States District Court for the District of Idaho, Northern Division, erred in overruling the defendant's objection to the introduction of all testimony relative to fires, interposed upon the ground that whatever damages resulted from fires would have to be recovered in an action at law, and that a court of equity was without jurisdiction to pass upon such matters, and that such testimony was incompetent under the issues in this case.

The substantial part of the testimony given, notwithstanding such objection, and to which this as-

signment relates, is as follows:

"The witness Dorr Skeels testified:

'I know of my own knowledge of fires having been started on the right of way in the summer of 1908. One started at Burns & Jordan's camp; one started in what they call the "loop" at a point where this railroad crosses Kelly Creek; one started at a point a short distance above Sturtevant & Proctor's camp in the NE. ¼ of section 7, Tp. 46 N., R. 6 East, and several other fires started along there for which I cannot give a definite location at present.

The fire that started near the Burns & Jordan's camp burned over about 30 acres; the worst fire started in the clearing made at Kelly Creek Bridge and burned north and east to the summit of the Bitter Root Mountains. It covered the greater part of four sections.

The fire killed the timber and young growth.

I did not make an estimate of the timber that was burned. I had Mr. Serry make an estimate under my direction.'

The witness Richard H. Rutledge testified:

'To a certain extent I am familiar with the burned district testified to by Mr. Skeels.

I was on the scene of the "loop fire" or the Kelly Creek fire soon after it started. I know where the fire originated.

The contractors started those fires. I am able to state that the contractors started the fires from the fact that they were using fire in their burning at those places right along, practically con-

tinuously, and that there was no other visible source for the fire.

I was able to trace the fire by its course from the right of way to the points where it spread.'

The witness Henry F. Kottkey gave testimony as follows:

'Practically all the fires but one I had in that district, which was a good many, could have been traced, for I have seen a good many of them started from the right of way of the Chicago, Milwaukee & St. Paul Railway Company, ever since they started the construction work.

All those fires originated from the brush burning or from sparks from the locomotives which fell into the brush.

In 1907 there were at least six or seven fires that originated on the right of way. All those fires I have spoken of originated on the right of way.

There was one fire at the camp of G. O. Foss & Co., where a man had been washing his clothes and left a fire burning; that was one fire that did not originate on the right of way. It went over the right of way and burned timber on each side.

I can recall where the first fire was in 1807. It was Kennedy & Frazier's work at the mouth of Turkey Creek. When that fire started I was patroling the lower end of the right of way down to the wagon-road and a man came on horseback to notify me that there was a fire that got away from a man that was working there at Kennedy

& Frazier's. When I got down there it had burned over about five or ten acres. You could trace this fire; fire leaves a track. I didn't see it start.

Kennedy & Frazier were contractors working on the road for the Chicago, Milwaukee & St. Paul.

The next fire that I recall in 1907 was from Charlie Johnson, contractor. That was east of the south of Kelly Creek. When it started I was, I guess, about three or four miles from the place where the fire started. I had been there that forenoon and seen the man burning the right of way and, of course, I draw my conclusions that when the fire got away it started from there."

The witness Otto F. Hanson testified:

'I saw one fire. It originated about 300 yards from where I was living; it kept me fighting fire for a while. That fire started about 200 yards west of tunnel 30 on the right of way. It burned over about forty acres. Most of that area was covered with small timber. It went all the way from pretty near brush up to six or eight inches. It was lodge-pole, yellow pine and fir, all mixed.'

The witness Daniel F. Seery testified:

'I made an estimate of the timber that was standing on the burned district near the right of way. I commenced on what was known as the "loop fire" and worked in connection with the men appointed by the railroad company.

By the indication on the ground I could see

that the fire started close to the steel bridge they were constructing across Kelly Creek. The fire ran north and the west side of section 7 north up Kelly Creek and extended into section 6, same township and range, across over in an easterly direction, section 5, same township and range, into section 8, to the west side of section 8, crossing over in a northeasterly direction into section 9, close to the Richmond mine and east to the Monitor mine, in section 8, back in a southwesterly direction to the "loop" in section 8. This map I hold before me contains a correct description of the burned area as described by me and the approximate acreage. Mr. Baker and I did make an estimate of the amount of timber that was burned over on each subdivision, and that amount is correctly stated on that map.

I noted the amount of seedlings that were burned.

I talked the matter over with Mr. Baker and Mr. Long; they did not assume the responsibility for the fire but they did for the timber that was destroyed, and eventually assumed the responsibility for the fire.'

The witness identified Exhibit 35 introduced in evidence to show the acreage burned over and the kinds and quantities of the timber burned, for which the Government seeks to recover damages in this case."

NOTE: The defendant objected to the introduction of any testimony relative to fires for the reason that whatever damages resulted from fires would

have to be recovered in an action at law; that a court of equity was without jurisdiction to pass upon such matter and that it was incompetent under the issues in this case. It was asked that this objection should be considered as going to all of the testimony in regard to fires. Such objection was further assigned in the specification of objections to the admission of evidence (see Assignment 14), but no direct ruling with respect thereto was made by the District Court, which court, however, considered and based in part its ruling upon such testimony and its action in this regard was affirmed by the United States Circuit Court of Appeals.

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court in disregarding such objection and admitting and considering the testimony objected to.

(10) The said United States District Court for the District of Idaho, Northern Division, erred in refusing to sustain the defendant's objection, based upon the ground that it was a self-serving statement, incompetent and not properly verified, to Plaintiff's Exhibit No. 35.

Said Exhibit No. 35 is a document too voluminous to quote. It is a tabulated statement showing the legal subdivisions of land, the acreage, kinds and quantities of timber therein, burned, with respect to which the plaintiff claimed and was awarded damages. The testimony with respect thereto is substantially as follows:

> "This paper you hand me is my report, the amount of timber of the various kinds. That

report was made October 12, 1908. I compiled this report every night; I took it first upon a note book and afterwards when I went in at night I wrote it in in ink here. That comprises the legal subdivisions by forties of all the fires from the 'loop' down to Arnold's Camp—the territory covered by the four maps. No one assisted me in the preparation of this report, but Mr. Baker had an exact copy of it. We compared it and checked it over. When they were finished, I did deliver a copy of this report to Mr. Day."

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court in admitting this exhibit.

(11) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objection to the following question asked of the witness Seery:

"What was the amount of damage agreed upon between you and Mr. Baker and Mr. Long?"

This question was objected to upon the ground that Mr. Baker and Mr. Long were not shown to have authority to make any agreement in that behalf. The witness Seery, notwithstanding the objection, gave the following answer to said question:

"At $4.00 per thousand $16,182.80. The amount of seedlings was 1344½, mixed seedlings at $10. per acre. I put that arbitrarily and I found since that it would cost more than that to re-seed that area."

The said United States Circuit Court of Appeals erred in affirming the action of the said District

Court with respect to said objection.

(12) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objection upon the same grounds to the following question asked of the witness Seery: "What was the total amount agreed between you and Mr. Long?" to which the witness answered: "$29,627.20."

The said United States Circuit Court of Appeals erred in sustaining the action of the said District Court with reference to said objection.

(13) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objection to the admission in evidence of the Plaintiff's Exhibit "1A" offered in evidence in connection with the testimony of the witness Rockwell. The exhibit was objected to, in so far as it purported to show values, upon the ground that they were based upon an incorrect method of arriving at the value of the timber destroyed and upon the further ground that the qualification of the witness to testify as to values had not been shown.

Exhibit "1A" is a document too voluminous to be quoted. It is a tabulated statement on four sheets showing in columns descriptions of area to which the figures refer, the subdivisions of sections, the condition of young trees, the age of immature timber on the areas burned and a variety of matters on which the witness based theoretical estimates of the values which young trees would have after reaching matur-

ity, estimating the age of 100 years to be maturity of that class of timber.

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibit.

(14) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objection to the introduction of Plaintiff's Exhibit "2A," the ground of objection being, as stated, that so far as showing quantities of timber in burned areas, it was a duplicate of Plaintiff's Exhibit "1A"; that in so far as it purported to show the cost of restocking and the value of the timber arrived at in that manner, it was immaterial, irrelevant and incompetent, the method not being a proper one to get at the market value of young timber, and upon the further ground that the qualifications of the witness to testify as to the cost had not been established.

Exhibit "2A" is a document too voluminous to be quoted. It consists of three sheets, attached together, containing tabulated statements compiled for the purpose of showing what it would cost to restock the areas of immature timber burned and to care for such timber until it had arrived at the age at which it was estimated the burned timber had arrived.

The said United States Circuit Court of Appeals erred in affirming the action of the District Court with respect to the admission and consideration of said exhibit.

(15) The said United States District Court for the District Court of Idaho, Northern Division,

erred in failing to sustain the defendant's objection to the admission of Plaintiff's Exhibit "3A," the grounds of said objection being the same as those interposed to the admission of the Plaintiff's Exhibit "1A."

Said exhibit is a document too voluminous to be quoted. It consists of two sheets attached together containing tabulated statements of the same nature and import as Plaintiff's Exhibit "1A."

(16) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objection to the admissibility of the Plaintiff's Exhibit "4A," the grounds of said objection being the same as those interposed to the admission of Plaintiff's Exhibit "2A," and the further ground of objection to the admissibility of all of said exhibits being specified, namely: that they are not competent under the issues of this case, the remedy for such injury, if any, being at law and a court of equity having no jurisdiction.

Plaintiff's Exhibit "4A" is a document too voluminous to be quoted. It consists of two sheets containing tabulated statements of the same nature and import as Plaintiff's Exhibit "2A."

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court with respect to the admission and consideration of said exhibit "4A."

(17) The said United States District Court for the District of Idaho, Northern Division, erred in failing to grant defendant's motion to strike out all of the testimony of the witness Rockwell for the rea-

sons assigned and the various objections interposed, and for the further reason that it appears that in his estimates of the cost he allowed an unwarrantable rate of interest based on the estimated value of the timber at maturity, and that there was no definite allowance for insurance or the probability that the timber would have been destroyed from other causes, and upon the further ground that the testimony was not competent, as furnishing any basis for equitable relief.

The substance of the testimony of said witness is as follows:

> "As a forest officer I made an examination of burned areas along the right of way of the Chicago, Milwaukee & St. Paul Railway Company in the Coeur d'Alene National Forest in Idaho during the summer and fall of 1909. I had for my guidance in making that examination maps and have those maps with me. Daniel F. Seery identified this map as a copy of one used by him in his examination of this same area. This map shows the area that was burned over by the fire extending along the Milwaukee right of way. I located the area burned on the ground and compared the area with the map. The burned area, located in T. 46 N., R. 7 E., extended over land aggregating 1016 acres in sections 5, 6, 7, 8, 9, 17 and 18. That covers all the area in this particular burn. I first made a casual examination to see the extent of the burn and what damage the fire had done and then made a study of the timber in the vicinity and what species were grow-

ing in that locality, what the rate of growth was and how much timber an acre of land would produce. I selected areas in the adjoining green timber which were growing under exactly the same conditions as were found on the fire areas, and carefully surveyed the plots. Then I measured the timber on each area. I ca[illegible]ered the trees, breast high, to find out how many trees there were of each diameter and of each species, and after having determined this, I selected average trees of the various diameters and cut these down; measured the diameters of the logs to determine the board feet contained, and in every case determined the age of the trees. From the volume of the average trees I determined the total volume per acre. I determined that the age at which the stand became merchantable was one hundred years. At the average age of one hundred years, the average diameter of the white pine was a little over twelve inches and red fir and larch slightly larger than that. I determined that the area was seventy-five per cent fully stocked and I had found from my examination of adjoining areas that fully stocked stands of that same kind of timber at one hundred years produced a certain amount of timber which would have a corresponding value at the stumpage rate of $4.00 per thousand. This would be the value of that young growth at maturity. The stand, however, was destroyed at fifteen years of age, so for eighty-five years the Government would be required to care for

that area to protect it. To ascertain the value of the present stand at fifteen years of age, I subtracted the cost for caring for the stand for eighty-five years from the value which could have been received for the timber at maturity—the amount per year per acre which would have been necessary to expend in the care of that area if it had not been destroyed by fire would have been three cents per acre. After determining what the value of the timber would be at maturity minus the cost of caring for the timber for the remaining time which the timber would have to stand in order to mature, the amount thus obtained was discounted to the present time by compound interest tables at three per cent. There were ten acres of immature timber ninety years of age, thirty per cent white pine, fifty per cent Douglas fir, fifteen per cent white fir, and five per cent western larch. I determined that it has a value of $576.35. I considered that the most practicable means which might be used in restoring this legal subdivision to its condition before the fire to be planting. The cost would be $15.00 per acre for replanting the stand with the same kind of young trees as were there before the fire. Taking the eight acres upon which the stand had an average of fifteen years, the total cost would be $143.76 for replanting that area with the species that had been destroyed and caring for the growth until it reached the age at which it was destroyed, and on the area of ten acres on which the average was ninety years,

the total cost to the Government of replanting that area and caring for it until it reached the age of ninety years would be $1129.00. Since part of this timber has been merchantable, however, the value of the merchantable part, $400.00, was subtracted from the total to get the value of the young growth alone, or $739.00. In the preparation of these sheets, Exhibits 1A, 2A, 3A and 4A, I used the method first described."

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court with respect to such motion and in considering the said testimony.

(18) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objections to the testimony of the witness William W. Morris.

It was admitted, subject to the same objections interposed to Mr. Rockwell's testimony, that Mr. Morris would, if examined at length, testify to the same facts already covered in Mr. Rockwell's testimony relating to the examination of the sample areas described and the computation of the quantities of timber found upon these sample areas, as well as the ages of the trees and their diameters.

The said United States Circuit Court of Appeals erred in affirming the action of said District Court with respect to said testimony and in considering the same.

(19) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's motion to strike

the testimony of the witness F. A. Wilcox as to the cost of fire protection. Said motion was made upon the ground that the testimony was incompetent, immaterial and irrelevant under the issues in this case. The substance of the testimony of said witness is as follows:

> "That in the district which includes the Coeur d'Alene National Forest, in connection with its timber sale work and fire protection, the Government is spending for all work about $742,000,000.00 which makes on 29,000,000 acres approximately 2½ cents per acre. For administration and timber sales it would be approximately one cent an acre and about one-half a cent an acre for fire protection proper. I figured that for three cents an acre we could put a man on fire patrol who can take care of the timber sale work on the present basis with a reasonable increase in sales and in addition provide one man for fire patrol to every thirty acres, depending on the fire danger. Of course fire danger cannot be entirely eliminated, but it will be reduced to a minimum, so much that we feel that it will be fairly safe. On a basis of one man for one-half township, he would be within approximately three miles of any fire started."

The said United States Circuit Court of Appeals erred in affirming the action of said District Court with respect to said testimony and in considering the same.

(20) The said United States District Court for the District of Idaho, Northern Division, erred in finding

that the plaintiff was entitled to recover from the defendant the sum of $12,000.00 on account of mature timber burned, and in including said amount in the sum for the recovery of which a decree was entered.

The said United States Circuit Court of Appeals erred in affirming the finding and decree of the said District Court with respect to the said sum of $12,000 on account of mature timber burned.

(21) The said United States District Court for the District of Idaho, Northern Division, erred in finding that the plaintiff was entitled to recover the sum of $24,000 for immature timber burned, and including such amount in the total sum for which it entered a decree in favor of the said plaintiff.

The said United States Circuit Court of Appeals erred in affirming the finding and decree of the said District Court with respect to the said sum of $24,000 for immature timber destroyed by fire.

(22) The said United States Circuit Court for the District of Idaho, Northern Division, erred in overruling the following demurrer to a portion of the bill of complaint herein, namely:

> "To so much of said bill as charges that the said defendant has cut and caused to be cut upon the said strip of land one hundred feet in width on each side of the center line of defendant's right of way, and prays relief with respect thereto; for that it appears from the face of said bill that the said defendant had full right and authority to so cut and cause to be cut, and remove and cause to be removed, said timber; and for the further reason that there is no equity in said matters, or any thereof.'

Said demurrer being set forth in the fourth paragraph of the demurrer filed herein."

The said United States Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court upon said demurrer.

(23) The said United States Circuit Court for the District of Idaho, Northern Division, erred in overruling the defendant's demurrer to a portion of said bill, said demurrer being as follows, to wit:

"To so much of said bill as charges that the said defendant has cut and removed, and caused to be cut and removed, a large amount of timber upon an additional strip of land upon the uphill side of said right of way, and upon land adjacent to said strips; for that it appears from the face of said bill that there is no equity in said matters, or in any thereof,"

Said demurrer being set forth in the 5th paragraph of the demurrer filed herein.

The said United States Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court with respect to said demurrer.

(24) The said United States Circuit Court for the District of Idaho, Northern Division, erred in overruling the following demurrer to a portion of said bill, namely:

"To so much of said bill as charges that the said defendant has cleared, and caused to be cleared, and is clearing and causing to be cleared, portions of said lands for the purpose of constructing a railroad, and has constructed and caused to be constructed and is constructing

and causing to be constructed, a railroad; and has conducted and is so conducting its operations that it has destroyed and caused to be destroyed and is destroying and causing to be destroyed, large amounts of small timber and young growth upon the land theretofore described in said bill, through unskilled methods of lumbering; for the reason that it appears upon the face of said bill that there is no equity in said matters,"

Said demurrer being set forth in the 6th paragraph of the demurrer filed herein.

The said United States Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court with respect to said demurrer.

(25) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objection to all testimony concerning timber cut and the value thereof, which objection was interposed upon the ground that there was no equity in such matters and that such evidence was incompetent and immaterial under the issues in this case, which objection was understood to apply to the testimony of all the plaintiff's witnesses upon these matters.

The substance of the testimony to which this assignment relates was given by different witnesses called in behalf of the plaintiff to the effect that along the defendant's right of way crossing specific subdivisions of land owned by the Government timber was cut and consumed by the defendant in the construction of its railroad; that other

merchantable timber was cut for the purpose of clearing the right of way and was destroyed; that other timber was cut on land adjacent to the right of way, partly in compliance with requirements of the officers and agents of the United States Forestry Service for clearing the ground, and partly for use in the construction of the railroad. The witness Skeels further testified that he made examination of such lands for the purpose of determining the quantities of timber so cut, had made notes of his examinations, measurements and estimates to determine the amount of acreage, the quantity of timber of different kinds so cut and destroyed, and he and other witnesses testified as to the values thereof. Mr. Skeels further testified that from his examination and memorandum exhibits 22 to 33 and exhibit 34 were made up, all of which exhibits are attached to the evidence which was submitted to the trial court.

The said District Court made no rulings on defendant's objections, either sustaining or overruling the same, although the defendant in due time filed written specifications of the particular matters and items of evidence objected to which called for specific rulings as to said matters, but the said District Court, as is apparent from the opinion filed and the decree entered, considered such testimony.

The said United States Circuit Court of Appeals erred in sustaining the action of the said District Court with respect to said objection and in considering the testimony so objected to.

(26) The said United States District Court for the District of Idaho, Northern Division, erred in

failing to sustain the defendant's objection to the testimony of the witness Dorr Skeels as to the quantity of timber cut and timber values, which objection was based upon the following grounds, to wit: (a) That under the issues of this case such questions were irrelevant and immaterial; that under the pleadings no questions of quantities of timber were involved; and (b) that under the admissions in the pleadings and in the stipulation, the defendant had the right to take all the timber on the 200 foot right of way and all other timber adjacent to the right of way which it needed for construction purposes.

The testimony of the witness, Mr. Skeels, so objected to was in substance as follows:

> That he was Forest Officer on the Coeur d'Alene Forest Reserve, acting as assistant to the supervisor, Mr. Rutledge, in the spring of 1907; that in that spring the Milwaukee Railway started actual construction work upon its railway through the Forest Reserve; that he cruised first, the right of way, 200 feet in width; that he had made a report of this work, but did not have such report with him; that the Railway Company finally cleared the right of way over 200 feet in width, and that he had with him a report of a cruise which he made of the right of way as finally cleared; that in some places it was cleared over 200 feet in width on each side of the center line, and that it would vary 250 feet in places; that the extra clearing was done because, in the construction of the railway by the Milwaukee Company in Montana through the Helena Forest

Reserve, the Forestry officers required them to clear a strip 200 feet in width on the upper side of the center line depending somewhat on the topography, and that it was agreed that if the Railway Company was allowed to proceed with the construction of the railroad through the Coeur d'Alene National Forest it would do the work in the same way; that the Railway Company's representative, Mr. Day, stated to the witness repeatedly that the Company desired to comply with the usual regulations required by the Forest Service when railroads were building through national forests; that the witness had the estimates he made of the timber cut over the right of way as finally agreed upon and it was, as stated, irregular in width; that the estimates showed the amount of timber cut on the forty-acre subdivision and the number of acres which they cut over in each forty acres, beginning at the Montana line in section 26, township 47 north, range 6 E., B. M.; that at the close of each day he worked up his notes and entered the data on the map; that the report which he had before him was in nearly every case made at the close of the day when the estimate was made; that sometimes he might go two or three days before working up the data on the maps in his report; that it would depend a good deal on the way the work went; that he began to work about June, 1908, and finished it near the close of September, 1908.

The witness then testified, refreshing his memory

from the memorandum before him, as to the quantity of timber on two forty-acre tracts, and without further identification exhibits 2 to 33, inclusive, being the memoranda prepared by the witness as to the estimates of the timber cut, were read into the record and received in evidence, subject to the objections of the defendant. The witness then stated that he had a report which he made to the forester of the Forestry Service, stating the amount of timber which was cut by the Railway Company on its right of way and on the strip along the right of way in building the road through Coeur d'Alene National Forest; that it was a compilation of exhibits 2 to 33 inclusive. This compilation was then offered and received in evidence over the defendant's objection as to its competency and marked Plaintiff's Exhibit 34. The witness then testified as to the market value of the timber.

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court in failing to sustain the defendant's objection to the testimony of the said witness Skeels in considering said testimony and in affirming the decree of said District Court.

(27) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objections to the admission in evidence of Plaintiff's Exhibits 2 to 33 inclusive. The admission of these exhibits was objected to on the ground that the documents which the witness was asked to read into the record were not his original memoranda, but compilations prepared

by him from his original memoranda and therefore not admissible as books or original entry, and that not being admissible evidence, they could not be gotten into the record by having the witness read them into the record; that being inadmissible in themselves they could not propertly be used by the witness or read into the record under guise of refreshing his memory and because the purpose of the testimony was to get the inadmissible documents themselves before the Court.

The exhibits referred to are too long to be quoted and consist of tabulated statements giving the quantity of feet of each kind of timber cut upon each Government subdivision. The testimony showing that these exhibits were not original memoranda, but compilations subsequently prepared by the witness is set forth in the statement of the substance of the witness' testimony under the last preceding assignment of error and is not therefore here repeated.

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibits and in thus considering said exhibits in its affirmance of the decree of said District Court.

(28) The said United States District Court for the District of Idaho, Northern Division, erred in failing to sustain defendant's objection to the admission in evidence of exhibit 34, for the reason that the same was incompetent, was not an original memorandum, but was a compilation prepared by the witness Dorr Skeels at times subsequent to the time for obtaining information from original sources.

Exhibit 34 is a document too voluminous to be quoted. The manner in which it was prepared has been heretofore stated in giving the substance of the testimony of the witness Skeels in Assignment of Error No. 26.

The said United States Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibit and in thus considering said exhibit in its affirmance of the decree of said District Court.

(29) The said United States District Court for the District of Idaho, Northern Division, erred in finding that the plaintiff was entitled to recover from the defendant the sum of $26,989.00 for timber cut upon the right of way and contiguous lands and in including such sum in the total amount which it decreed the plaintiff should have and recover of and from the said defendant.

The said United States Circuit Court of Appeals erred in affirming the finding of the said District Court to the effect that the plaintiff was entitled to recover from the defendant said sum of $26,989.00 for timber cut, and in including said sum in the total amount which it was decreed the plaintiff should recover of the said defendant.

(30) The said United States Circuit Court of Appeals erred in failing to hold that the following demurrer duly interposed to the filing of the complaint herein, should have been sustained:

> "To said bill for that the same is multifarious in this: that the said complainant has joined in said bill matters for which the said complainant has a

plain, speedy and adequate remedy at law with matters of equitable cognizance, the said matters being separate and distinct; that the said complainant has joined in said bill a cause of action arising out of an obstruction of a highway of the state of Idaho, and with which the said complainant has nothing to do, with a cause of action for damages arising out of alleged negligent acts of said defendant in setting out fires and thereby burning and destroying timber, together with an alleged cause of action for wilful waste and continuous trespass."

(31) The said United States Circuit Court of Appeals erred in failing to hold that the following demurrer, duly interposed to the bill of complaint, should have been sustained, viz.:

"To the said bill for that the same is without equity and does not set forth any matters entitling said complainant to any relief from this Court."

(32) The said United States Circuit Court of Appeals erred in failing to hold that the so-called "Peck Agreement" was invalid.

This alleged agreement is in words and figures as follows:

"UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE.

Chicago, Milwaukee and St. Paul Railway Company of Idaho—Railroad (Interior)—Coeur d'Alene National Forest, Idaho.

WHEREAS, The Chicago, Milwaukee and St. Paul Railway Company of Idaho desires imme-

diate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana.

Date, May 10, 1907.

(Signed) GEO. R. PECK."

(See Exhibit "C" attached to bill of complaint.)

(33) The said United States Circuit Court of Appeals erred in failing to hold that such agreement, if valid, was one which a court of equity would not specifically enforce.

(34) The said United States Circuit Court of Appeals erred in failing to order the dismissal of this action upon the ground that the stipulation which the bill of complaint prayed the defendant be required to execute was not such a stipulation as was within the terms of the so-called "Peck Agreement."

(35) The said United States Circuit Court of Appeals erred in affirming the action of the United States District Court for the District of Idaho, Northern Division, requiring the defendant to execute an agreement materially different from that which the bill of complaint prayed the defendant be required to execute, and one the execution of which

was never requested or demanded by the complainant.

(36) The said United States Circuit Court of Appeals erred in failing to hold that the following conditions, contained within the stipulation which the said United States District Court for the District of Idaho, Northern Division, had required the defendant to execute, were severally *ultra vires* and not authorized by law, viz.:

(a) The provision in said stipulation requiring the defendant to pay for timber cut upon the right of way or taken for construction purposes from lands adjacent thereto.

(b) The provision in said stipulation requiring the defendant to pay for timber burned in the course of construction of its road.

(c) The provision in said stipulation requiring the defendant to pay for timber cut outside of the right of way in compliance with the orders or directions of the officers of the Forestry Department of the United States.

(d) The provision in said stipulation requiring the defendant to clear lands in the limits of the right of way prescribed by the act of Congress approved March 3, 1875.

(e) The provision in said stipulation requiring the defendant to pay for cordwood the sum of $1.00 per cord, or any sum, or for merchantable timber the sum of $3.00 per thousand feet board measure, or any sum.

(f) The provision in said stipulation requiring the defendant to accept as final the decision of an

executive officer or employee of the United States as to the quantities of timber cut.

(g) The provision in said stipulation requiring the defendant to put in a sidetrack sufficient to handle timber and wood sold from the National Forest.

(h) The provision in said stipulation requiring the defendant to pay for timber burned, or to pay unto the complainant or into any depositary for its benefit any sum whatsoever for timber burned.

(37) The said United States Circuit Court of Appeals erred in failing to hold that the said United States Circuit Court for the District of Idaho, Northern Division, and its successor the said United States District Court for the District of Idaho, Northern Division, were without jurisdiction in this action to award to the complainant damages for the following matters, to wit:

(a) For timber cut or removed from the right of way or contiguous land.

(b) For timber burned.

(c) For immature timber destroyed.

(d) For injuries sustained by rock and other debris thrown into the St. Joe River, or its tributaries; and in denying unto the said defendant the right to a trial by jury upon said several matters.

(38) The said United States Circuit Court of Appeals erred in failing to hold that the defendant could not lawfully be required to enter into any stipulation with the United States as a condition precedent to obtaining the approval of its right of way maps filed pursuant to the provisions of the act

of Congress approved March 3, 1875, and the rules and regulations of the Interior Department of the United States promulgated thereunder.

(39) The said United States Circuit Court of Appeals erred in failing to hold that the matter hereinafter set forth was immaterial, and that the defendant's objection thereto should have been sustained, the said matter being the following matter contained in the 3d paragraph of the stipulation of facts entered into between the parties hereto, subject to all objections as to competency, materiality and relevancy, viz.:

> "That on March 21, 1905, the Commissioner of the General Land Office transmitted to the register and receiver of the United States District Land Office at Coeur d'Alene City, Idaho, the following letter which (omitting formal parts and signatures) reads as follows:
>
> (Letter, dated March 21, 1905, Commissioner of General Land Office to U. S. District Land Office at Coeur d'Alene, Idaho.)
>
> 'By direction of the Secretary of the Interior, I hereby temporarily withdraw from all disposal, except under the mineral laws, all the vacant unappropriated public lands in the following described area in your district:
>
> All of townships 42 N. and 43 N., lying east of Range 2 E.
>
> All of township 44 N., lying east of Range 3 East.
>
> All of township 45 N., lying east of Range 4 East.

All of townships 46 N. and 47 N., lying east of Range 2 East.

All of Boise Meridian, Idaho.

Note this withdrawal upon the records of your office.' (144)

That at the same time he transmitted to the Register and Receiver of the United States Land Office at Lewiston, Idaho, a similar letter but describing only lands in townships 37, 38, 39, 40, 41 and 42 north."

(40) The said United States Circuit Court of Appeals erred in failing to hold that the matter hereinafter set forth was immaterial, and that the defendant's objection thereto should have been sustained, the said matter being the following contained in the 12th paragraph of said stipulation of facts, viz.:

"That May 10th, 1907, George R. Peck, as General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho, filed with the United States Department of Agriculture Forest Service a paper writing as follows, to wit: (158)

(Writing Filed May 10, 1907, by General Counsel Chicago, etc. Ry. Co. with U. S. Department of Agricultural Forest Service.)

UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE.

Chicago, Milwaukee & St. Paul Railway Company of Idaho,—Railroad (Interior)—Coeur d'Alene National Forest, Idaho.

'WHEREAS, the Chicago, Milwaukee and St.

Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the Company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana.'

Date May 10, 1907.

(Signed) GEO. R. PECK,
General Counsel for the Chicago, Milwaukee and St. Paul Railway Company of Idaho.

And thereupon the United States Acting Forester made upon said paper writing the following indorsements, to wit:

(Endorsement made by U. S. Acting Forester on Writing filed May 10, 1907, by General Counsel, Chicago etc. Ry. Co.)

'Approved and advance permission given to construct, subject to ratification hereof by the Company.

Date: May 10, 1907.

JAMES B. ADAMS,
Acting Forester.'

That thereupon on May 10, 1907, G. F. Pollock, Chief of the office of Lands of the Forest Service in the United States Department of Agriculture, transmitted to Richard H. Rutledge,

Forest Supervisor of the Coeur d'Alene National Forest, the following telegram, to wit (formal parts and signatures omitted):

(Telegram dated May 10, 1907, Pollock to Rutledge.)

'Advance permission given to-day St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows.

POLLOCK.'

And on May 11, 1907, said Pollock transmitted to said Rutledge the following letter, to wit (formal parts and signature omitted):

(Letter, dated May 11, 1907, Pollock to Rutledge.)

'The following telegram in this case was sent to you to-day: "Advance permission given to-day St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulation. Supervise clearing and piling and scale all timber cut. Letter follows."

A blue-print showing the route has been sent to you under separate cover. Enclosed with this letter is a copy of the preliminary stipulation entered into to-day at this office with Mr. Geo. R. Peck, General Counsel for the road. There is also enclosed a copy of the stipulation executed by the Company in respect to its road through the Helena National Forest. The stipulation to be executed by the Company in this

case will be as nearly as practicable like that executed in the Helena case.

Please examine carefully the enclosed copy of the Helena stipulation and at the earliest practicable date submit your report on Form 964, giving particular attention to the question of the width necessary to be cleared in order to protect the forest from fire.

By separate letters, you will be fully instructed in regard to the cutting and payment for timber, and how to prepare your part of the report affecting the timber."

(41) The said United States Circuit Court of Appeals erred in failing to hold that the letter of March 14, 1905, with the endorsements thereon, Defendant's Exhibit 1, was incompetent. Said exhibit, excluding the certain formal parts and signatures, is as follows:

"As a result of investigation by the Bureau of Forestry in the State of Idaho, I have the honor to recommend the immediate withdrawal of the following described lands, pending the creation of the proposed Shoshone Forest Reserve:

Township 47 north, ranges 3 to 6 east; township 45 north, ranges 5 to 9 east; township 44 north, ranges 4 to 9 east; township 42 north, ranges 3 to 9 east; township 42 north, ranges 3 to 11 east; township 41 north, ranges 4 to 11 east; township 40 north, ranges 7 to 11 east; township 39 north, ranges 7 to 14 east; township 38 north,

ranges 8 to 9 east; township 37 north, ranges 7 to 9 east; Boise Principal Meridian.'

The endorsement on the foregoing letter in words and figures reads as follows:

'1006.

Department of the Interior: Received Mar. 18, 1905.

L. & R. R. Div.

Acting Secretary of Agr. March 14, 1905.

Recommends the withdrawal of described lands for the proposed Shoshone Forest Reserve, Idaho.

J. I. P.

DEPARTMENT OF THE INTERIOR,
March 20, 1905.

U. S. General Land Office,
Received Mar. 21, 1905. 4770.

48961.

Acknowledged and respectfully referred to the Commissioner of the General Land Office with instructions to withdraw the lands herein described in accordance with the recommendation of the (176) Acting Secretary of Agriculture, unless there is some good reason why such action should not be taken.

Advise the Department of action taken with return of this letter.

E. A. HITCHCOCK,
Secretary."

(42) The said United States Circuit Court of Appeals erred in failing to hold that the order of

withdrawal made by the Commissioner of the General Land Office, March 25, 1905, was void.

(43) The said United States Circuit Court of Appeals erred in failing to hold that the order of withdrawal made by the Commissioner of the General Land Office March 25, 1905, even if valid as to settlers, did not exclude the lands withdrawn from the operations of the act of Congress approved March 3, 1875, granting rights of way to railway companies through the public lands of the United States.

(44) The said United States Circuit Court of Appeals erred in failing to hold that the defendant company had, prior to November 6, 1906, the date of the President's proclamation creating the Coeur d'Alene Forest Reserve, by its compliance with the terms and provisions of the act of Congress approved March 3, 1875, acquired the grant of a right of way 200 feet in width with the privilege of taking material of earth, stone and timber for the construction of its railway over and across the lands included in such forest reserve, which was prior in time and which precluded the extinguishment of the rights of the Railway Company by the creation of such reserve.

(45) The said United States Circuit Court of Appeals erred in holding that the making of amended locations of said railroad, and the filing of maps thereof in the United States District Land Office, rendered the grant of right of way and of the privilege of taking material of earth, stone and timber from lands adjacent to the right of way for the

purpose of constructing said road, subsequent in time to the creation of said Forest Reserve.

(46) The said United States Circuit Court of Appeals erred in holding that a forest reservation, created by proclamation of the President, excepted and excluded the reserved lands from the operation of the act of Congress approved March 3, 1875, granting rights of way to railway companies with the privilege of taking material of earth, stone and timber from the public lands adjacent to the line of the road for the construction thereof.

(47) The said United States Circuit Court of Appeals erred in failing to hold that the grant to the Railway Company of a right of way through said forest reserve, with the privilege of taking material of earth, stone and timber adjacent to the line of its road for the construction thereof was, by the terms of the President's proclamation of November 6, 1906, creating said reserve, excluded from such reservation.

(48) The said United States Circuit Court of Appeals erred in holding that the provisions of the act of Congress approved March 3, 1899, namely: "that in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon-road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby" operated either as a grant, or vested in the Secretary of the Interior authority to make a grant, of such right of way, or that it authorized the Secre-

tary of the Interior to prevent the location and construction of railways in forest reservations by railway companies, who had accepted the grant made by Congress by the act approved March 3, 1875, by duly filing a certified copy of their articles of incorporation and due proofs of their organization in the office of the Commissioner of the General Land Office.

(49) The said United States Circuit Court of Appeals erred in holding that the provision of the act of Congress approved March 3, 1899, authorized the Secretary of the Interior to impose conditions upon the approval of maps of railway location by railway companies who had become grantees under the provisions of the act of March 3, 1875, requiring such railway companies to purchase and pay for right of way, or for timber standing thereon, or for material of earth, stone and timber taken from adjacent lands of the United States for the purpose of constructing such railway.

(50) The said United States Circuit Court of Appeals erred in holding that the Secretary of the Interior had power, under the provisions of the act of Congress approved March 3, 1899, to limit within the boundaries of forest reserves the grants made by the act of Congress approved March 3, 1875, to a grant of land only for right of way purposes.

(51) The said United States Circuit Court of Appeals erred in failing to hold that the defendant had the right to cut and remove without charge therefor all timber growing upon its right of way.

(52) The decree entered herein, having provided that the maps filed by the defendant should be

deemed filed and approved as of May 10, 1907, the United States Circuit Court of Appeals erred in failing to hold that as to all timber cut from the right of way, and as to all material of earth, stone and timber taken for construction purposes from lands adjacent to said right of way subsequent to said date of May 10, 1907, the complainant was not entitled to any compensation whatsoever.

(53) The said United States Circuit Court of Appeals erred in failing and refusing to reverse and set aside the decree of the United States District Court for the District of Idaho, Northern Division, entered herein, and erred in failing to enter an order or decree either dismissing said action or remanding said cause to the said United States District Court with directions to enter an order or decree dismissing said action.

WHEREFORE, the said appellant prays that the order of the said United States Circuit Court of Appeals for the Ninth Circuit, made and entered in the above-entitled cause on the 2d day of November, A. D. 1914, affirming the decree of the said United States District Court for the District of Idaho, Northern Division, made and entered in said cause on to wit: June 11, 1913, and the said decree of said District Court, be reversed, set aside and wholly held for naught.

H. H. FIELD,
F. M. DUDLEY,
Solicitors for Appellant.

[Endorsed]: No. 2351. United States Circuit Court of Appeals for the Ninth Circuit. Chicago,

Milwaukee & St. Paul Railway Company, of Idaho, a Corporation, Appellant, vs. United States of America, Appellee. Assignment of Errors and Prayer for Reversal. Filed Apr. 29, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS: That we, Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation, and the National Surety Company of New York, a corporation organized under the laws of the State of New York and authorized to become surety upon bonds in the states of Idaho and California, under the laws of said states, are held and firmly bound unto the above-named United States of America, in the sum of eighty-two thousand five hundred dollars ($82,500.00), to be paid unto the said United States of America, for the payment of which well and truly to be made we bind ourselves, our and each of our suc-

cessors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of April, A. D. 1915.

WHEREAS, the above-named Chicago, Milwaukee & St. Paul Railway Company of Idaho is prosecuting an appeal to the Supreme Court of the United States of America, to reverse the decree rendered in the above-entitled action by the United States Circuit Court of Appeals for the Ninth Circuit on the 2d day of November, A. D. 1914;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Chicago, Milwaukee & St. Paul Railway Company of Idaho shall prosecute said appeal to effect and pay all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO,
By H. B. EARLING,
President.

[Seal] Attest: F. M. DUDLEY,
Acting Secretary.

NATIONAL SURETY COMPANY,
[Seal] By FRANK L. GILBERT,
Attorney in Fact.

Approved April 29, 1915.
WM. W. MORROW,
United States Circuit Judge for the Ninth Circuit, and one of the Judges of Said Circuit Court of Appeals.

[Endorsed]: Bond on Appeal to Supreme Court U. S. Filed Apr. 29, 1915.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond.

The above-named appellant, having duly filed a notice of appeal praying an appeal to the Supreme Court of the United States to reverse the decree of the above-entitled court, entered in the above-entitled cause, affirming the decree of the United States District Court for the District of Idaho, Northern Division, and it appearing that the matter in dispute in said cause, exclusive of costs exceeds the sum of five thousand dollars ($5,000.00), and that the above-named appellant is entitled to the allowance of an appeal;

IT IS ORDERED, that the prayer of said appellant for an appeal to the Supreme Court of the United States from the final decree of the above-entitled court, entered in the above-entitled cause be, and the same is, hereby allowed.

IT IS FURTHER ORDERED, that the said appeal operate as a supersedeas in this action upon the filing by the said appellant with the clerk of this court in the above-entitled cause of a good and sufficient bond, with surety satisfactory to the judge of this court, for the payment unto the said appellee of the sum of eighty-two thousand five hundred dollars ($82,500.00), lawful money of the United States of America, conditioned that if the said appellant shall prosecute its said appeal to effect and pay all damages and costs if it fail to make its appeal good, then the said obligation shall be void, otherwise to remain in full force and effect.

Dated this 29th day of April, A. D. 1915.

WM. W. MORROW,

United States Circuit Judge for the Ninth Circuit, and one of Judges of Said Circuit Court of Appeals.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond. Filed April 29, 1915.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Praecipe for Record on Appeal to the Supreme Court of the United States.

To the Clerk of the Above-entitled Court:

You will please issue and transmit to the Supreme Court of the United States a certified transcirpt of the record on appeal to said court in the above-entitled cause, consisting of the following:

1. Copy of printed transcript of record on which said cause was heard in the said United States Circuit Court of Appeals for the Ninth Circuit, to which you will please add a certified copy of each of the following papers that were filed, and of all of the proceedings that were had, in said United States Circuit Court of Appeals.

(a–1) Order of submission.

(a–2) The decree and opinion of the said United States Circuit Court of Appeals.

(b) The petition for appeal to the Supreme Court of the United States.

(c) The order allowing said appeal and fixing the amount of the appeal and supersedeas bond.

(d) The assignment of errors filed with said petition for appeal.

(e) Appellant's bond on its appeal to the Supreme Court of the United States.

(f) This praecipe.

(g) Your certificate to the transcript of record on appeal to the Supreme Court of the United States.

(h) The original citation on appeal to the Su-

preme Court of the United States, together with proofs or admission of service thereof.

(i) Prepare 60 printed copies of said record.

H. H. FIELD,
F. M. DUDLEY,
Solicitors for Appellant.

[Endorsed]: No. 2351. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Company, of Idaho, a Corporation, Appellant, vs. United States of America, Appellee. Praecipe for Record on Appeal to the Supreme Court of the United States. Filed Apr. 29, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Order Directing Transmission of Original Exhibits to Supreme Court U. S.

An appeal to the Supreme Court of the United States having been allowed the appellant on the 29th day of April, A. D. 1915, in the above-entitled cause and counsel for the appellant having requested the

clerk to transmit to said Supreme Court, accompanying the certified Transcript of Record on said appeal, certain of the original exhibits heretofore placed of record in the cause in this court, it is ORDERED that the clerk of this court may withdraw from the files all of the original exhibits heretofore received by him and of record herein, viz.:

Complainant's Original Exhibits Nos. 2 to 27, inclusive; and 29 to 39, inclusive;

Government's Nos. 1A, 2A, 3A and 4A, and Defendant's Original Exhibits A, B and X (Blue-print maps),

and transmit the same to the said Supreme Court accompanying said transcript of record on appeal for inspection and consideration under Section 4 of Rule 8 of said Supreme Court.

WM. W. MORROW,

United States Circuit Judge and one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 5, 1915.

[Endorsed]: No. 2351. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Co., etc., vs. United States of America. Order Directing Transmission of Original Exhibits to Supreme Court U. S. Filed Jun. 5, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred and forty-six (646) pages, numbered from and including 1 to and including 646, to be a true copy of the complete record made pursuant to the praecipe filed by counsel for the appellant on the twenty-ninth day of April, A. D. 1915, under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the Opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together with the accompanying original exhibits, viz.: Complainant's Origi-

nal Exhibits Nos. 2 to 27, inclusive, and 29 to 39, inclusive; Government's Exhibits Nos. 1A, 2A, 3A and 4A, and Defendant's Original Exhibits A, B and X, constitute the Transcript of Record on the Appeal taken by the appellant to the Supreme Court of the United States in the above-entitled cause, as made and certified pursuant to the said praecipe.

I further hereby certify that Complainant's Original Exhibit No. 28 in said cause was not received by me from the clerk of the court below with the above-mentioned original exhibits, and has not yet been received by me.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this tenth day of June, A. D. 1915.

[Seal] F. D. MONCKTON,
Clerk.

By MEREDITH SAWYER,
Deputy Clerk.

[Canceled U. S. Internal Revenue 10 cent Documentary Stamp.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Admission of Service [of Papers on Appeal to Supreme Court U. S.].

The undersigned, Jno. W. Davis, Solicitor General of the United States, and one of the solicitors for the defendant appellee in the above-entitled case, hereby admits service by the delivery of a copy thereof on this 26th day of May, A. D. 1915, of each of the following papers entitled in said cause, viz.:

(a) The citation hereunto attached.
(b) Praecipe for record on appeal to the Supreme Court of the United States.
(c) Appeal Bond.
(d) Order Allowing Appeal.
(e) Notice of Appeal.
(f) Assignment of Errors and Prayer for Reversal.

JNO. W. DAVIS,
Solicitor General.

K.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2351.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Citation on Appeal to Supreme Court U. S.

United States of America,—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, in the District of Columbia, on the 28th day of June, A. D. 1915, pursuant to an order allowing an appeal from the final decree of the United States Circuit Court of Appeals for the Ninth Circuit, dated November 2d, A. D. 1914, in the above-entitled cause, wherein the Chicago, Milwaukee & St. Paul Railway Company of Idaho, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the said decree in the said cause mentioned, should not be corrected, and why speedy justice should not be done to the appellant in that behalf.

WITNESS, the Honorable WILLIAM W. MORROW, United States Circuit Judge for the Ninth

Judicial Circuit, and one of the Judges of the said Circuit Court of Appeals, at San Francisco, California, this 29th day of April, A. D. 1915, and of the Independence of the United States, the 139th.

WM. W. MORROW,

United States Circuit Judge for the Ninth Judicial Circuit, and one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 2351. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Company, of Idaho, a Corporation, Appellant, vs. United States of America, Appellee. Citation. Filed Jun. 5, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

STIPULATION AND ADDITION TO RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 176.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

RECORD FILED JUNE 24, 1915.

STIPULATION FILED NOVEMBER 24, 1916.

(24,812)

(24,812)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 176.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1916.

1 In the Supreme Court of the United States.

October Term, 1916.

No. 176.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, a Corporation, Defendant and Appellant,

vs.

UNITED STATES OF AMERICA, Complainant and Appellee.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

It is hereby stipulated that the stipulation between the parties hereto, dated August 12, 1916, and filed in this cause (then bearing No. 529, October term 1915), is now withdrawn and abrogated.

That pursuant to the provisions of Sections 2 and 9 of Rule 10, as amended March 20, 1916, it is further stipulated (waiving the requirements of said rule as to time) that the Clerk of the Supreme Court may print, in addition to the transcript of record heretofore printed and on file in his office, the following documents, to-wit:

I. This stipulation.

II. (1) Complainant's Exhibit No. 2.

It is hereby stipulated that this exhibit is similar in form and character to Complainant's Exhibits Nos. 3 to 33, inclusive
2 (not printed) and is representative thereof; that all these exhibits (Nos. 2 to 33) taken together cover the entire strip of land cleared of timber by the company along the line of its road through the Coeur d'Alene National Forest; and that the notations and data on said exhibits Nos. 2 to 33 are correctly reproduced and summarized in tabular form in the tables forming part of plaintiff's Exhibit No. 34, already printed (Record 462-487).

(2) Complainant's Exhibit No. 37.

It is hereby stipulated that this exhibit is similar in character to Complainant's Exhibits Nos. 36, 38 and 39; that these four exhibits together cover the burned areas in respect of which damages were awarded by the decrees below; and that the notations and data appearing on the face of said exhibits are correctly reproduced and summarized in tabular form in Complainant's Exhibit No. 35, already printed (Record 488-495).

(3) Complainant's Exhibits 1-A and 2-A.

It is hereby stipulated that Complainant's Exhibit 3-A is similar in character to Complainant's Exhibit 1-A, and that Complainant's Exhibit 4-A is similar in character to Complainant's Exhibit 2-A; and that said Exhibits 3-A and 4-A cover all the burned areas involved other than that designated as the "loop fire", which is covered by 1-A and 2-A.

(4) Defendant's Exhibit "X" (map);

This is a plat introduced in evidence in the lower court by stipulation (Record p. 207), showing the three routes represented by the maps of definite location, filed by the defendant, and referred to in the record, viz: First map filed October 23, 1906; (Com-
3 plainant's Exhibit A, Record pp. 11, 65, 192). Second map filed March 20, 1907; (Record pp. 14, 68, 198. Third map filed May 10, 1907; (Complainant's Exhibit B, Record pp. 17, 18, 71, 203).

Which above named original exhibits have been transmitted to the Clerk of the Supreme Court, accompanying the transcript of record, for inspection and consideration under Section 4 of Rule Eight, by order of the Circuit Court of Appeals.

III. Also, a certain stipulation of the parties, made, signed and filed in the District Court, pursuant to the suggestion or invitation of said District Court (Record, pp. 166-169), dated April 1, 1913, (omitting therefrom the form of proposed agreement attached thereto), which stipulation was omitted from the transcript of record from the District Court, filed in the Circuit Court of Appeals, and is as follows, towit:

"Whereas, the above entitled court, in the decision rendered by it in the above entitled cause April 1, 1913, directed that the parties attempt to agree upon the form of a stipulation as nearly like the Helena stipulation as practicable, or in the alternative that each of said parties furnish a draft embodying its views of a stipulation as nearly like the Helena stipulation as practicable; and

Whereas, the parties have agreed upon the form of a stipulation which they deem to be as nearly like the Helena stipulation as practicable;

Now, Therefore, it is understood and agreed that the form of stipulation hereunto attached and marked Exhibit "A" is as nearly as practicable like the form of a stipulation in the Helena Forest Reserve.

It is further understood and agreed that the said defendant does not hereby waive any of its rights or contentions in the above entitled action, and that it hereby reserves the right to object to the signing of a stipulation embodying the provisions set forth in the stipulation Exhibit "A", hereunto attached, and to the signing of any stipulation whatsoever; and that it does not hereby con-
4 cede the right of the court in this proceeding to require it to execute the agreed or any form of stipulation; and that it reserves each and every legal objection which it has heretofore interposed, or which it could interpose under the pleadings and evidence in this cause, to the execution of this or any stipulation with like effect as if this agreement, as to what would be a stipulation as nearly as practicable like the Helena stipulation had not been entered into."

(Signed by Solicitors of both parties).

IV. It is also stipulated and agreed between the parties hereto tnat an error appearing in the transcript of record, in respect to the Articles of Incorporation of the defendant, filed in the office of the

County Recorder of Nez Perce County, Idaho, on January 19, 1906, and a certified copy thereof in the office of the Secretary of State of the State of Idaho on January 23, 1906, shall be corrected, in respect to paragraph VIII of said Articles, so as to read "between the 46th and 47th degrees of north latitude", instead of "between the 46th and 57th degrees", as appears in the transcript of record, and in the opinion of the Circuit Court of Appeals.

V. It is further agreed that this stipulation insofar as it relates to exhibits certified to this court, but not printed, is made merely for the purpose of saving printing expenses, and that the exhibits not printed may be referred to for the same purpose and with the same effect as if all the exhibits so certified were printed, or none were printed.

Dated, November 2, 1916.

H. H. FIELD AND
F. M. DUDLEY,
Solicitors for Appellant.
JNO. W. DAVIS,
Solicitor General.

5 [Endorsed:] 176/24,812. In the Supreme Court of the United States. Chicago, Milwaukee & St. Paul Railway Company of Idaho, Defendant & Appellant, vs. United States of America, Complainant & Appellee. Stipulation.

6 [Endorsed:] File No. 24,812. Supreme Court U. S., October term, 1916. Term No. 176. Chicago, Milwaukee & St. Paul Ry. Co. of Idaho, Appellant, vs. The United States. Substituted stipulation for printing addition to record. Filed November 24, 1916.

Form 378

No 402.

Filed August 11-1911
a Richardson Clerk

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

Exhibit "2"

MAP SHEET

PLATE 1 No

Coeur d Alene National Forest.

Division ..... District ....., Block .....

T. 47 N 6 E , B M., Section 26 , Quarter .....

Mapped by Skeels Scale; 8 inches=1 mile.

#176
Bonner St P Ry
v
The U.S.
97

T 7 S R 27 E
Thurlow

SECTION 26 T 4 N R 6 E

State MONT. IDAHO Line

0.66 A.

Cliff Creek

2. A.
W.P. 400
L.P. 1,600
Sp. 18,800
W.F. 7,000
27800

1. A.
W.P. 200
L.P. 800
Sp. 9,400
W.F. 3,500
Total 13900

Right of way entering Forest S.W. S½ S½ S½ 35 ft. on each side

50

60

B-453

M

MAPS

TOO

LARGE

FOR

FILMING

ST

Coeur d'Alene - Trespass (Fire)
C.M.& P.S.R.R.Co. 1908

Deter

I	II	III	IV	V	VI	
Sec 7	NW¼ SW¼	Seedlings	15	8	L.P.	10
					D.F.	40
					W.P.	40
					W.Lar.	10
	"	Partly Merc.	70	2	D.F.	100
	SW¼ NW¼	Seedlings	15	16	W.P.	35
					D.F.	35
					W.Lar	20
					L.P.	10
	SE¼ NW¼	"	15	20	W.P.	50
					D.F.	20
					W.F.	20
					R.C.	5
					E.S.	5
	"	"	15	20	L.P.	100
	NE¼ NW¼	"	15	25	W.P.	30
					D.F.	25
					W.L.	25
					W.F.	15
					E.S.	5
	NW¼ NE¼	"	15	10	L.P.	100
	"	"	15	20	W.P.	30
					D.F.	30
					W.F.	25
					L.P.	15
	NE¼ NE¼	"	15	5	L.P.	100
	"	Partly Merc.	70	10	L.P.	90
					W.P.	10
	"	"	80	25	D.F.	50
					W.P.	25
					W.Lar.	25
	SE¼ NE¼	"	80	15	W.P.	30
					D.F.	30
					W.Lar	30
					L.P.	10
	"	Seedlings	15	5	L.P.	100
	"	"	10	20	W.P.	80
					D.F.	20
	SW¼ NE¼	"	15	10	L. P.	100
	"	"	10	30	W.P.	35
					D.F.	35
					W.Lar.	30

L O O P F I R E A R E A

EXPECTATION VALUE DAMAGE TO YOUNG GROWTH

Determined by Discounting from Value At Maturity (cont'd.)

VII	VIII	IX		X	XI			XII	XIII		XIV	XV
			$	$			$	$		$		
50	W.P.-D.F.	262	1048.00	81.32				81.32	Tam. 10 R.F. 75	340.00		
50	D.F.	45	180.00	73.48				73.48				
		684	2736.00	210.84				210.84	W.P. 20 R.F. 5 Tam. 15	160.00		
75	W.P.-D.F. -W.Lar.											
100	W.P. & D.F	1310	5240.00	406.60				406.60	R.F. 5 Tam. 4 R.C. 4	52.00		
50	L.P.	300	1200.00	88.10				88.10				
80	W.P.- D.F. -W.Lar.	1140	4560.00	351.40				351.40	W.P. 50 R.F. 21 R.C. 3 W.F. 10	344.00		
80	L.P.	240	960.00	70.48				70.48				
30	W.P.- D.F.	393	1572.00	121.98				121.98	W.P. 100 R.F. 75 Tam. 150 R.C. 50	1500.00		
100	L.P.	150	600.00	44.05				44.05				
90	L.P.	270	1080.00	439.65	L.P.	75	300.00	139.65				
80	W.P.-D.F. -W.Lar.	1140	4560.00	2510.40	W.P. D.F. W.L.	50 150 75	1100.00	1410.40				
80	W.P.-D.F. -W.Lar	684	2736.00	1506.24	D.F. W.L.	30 20	200.00	1306.24				
100	L.P.	150	600.00	44.05				44.05				
5	W.P.	91	364.00	24.52				24.52				
80	L.P.	240	960.00	70.48				70.48				
20	W.P.-D.F. -W.Lar.	342	1368.00	90.06				90.06	W.P. 40 R.F. 60 Tam. 20 Ced. 48 W.F. 35	772.00		
60	D.F.	135	540.00	297.10	D.F. W.L.	20 10	120.00	177.00				

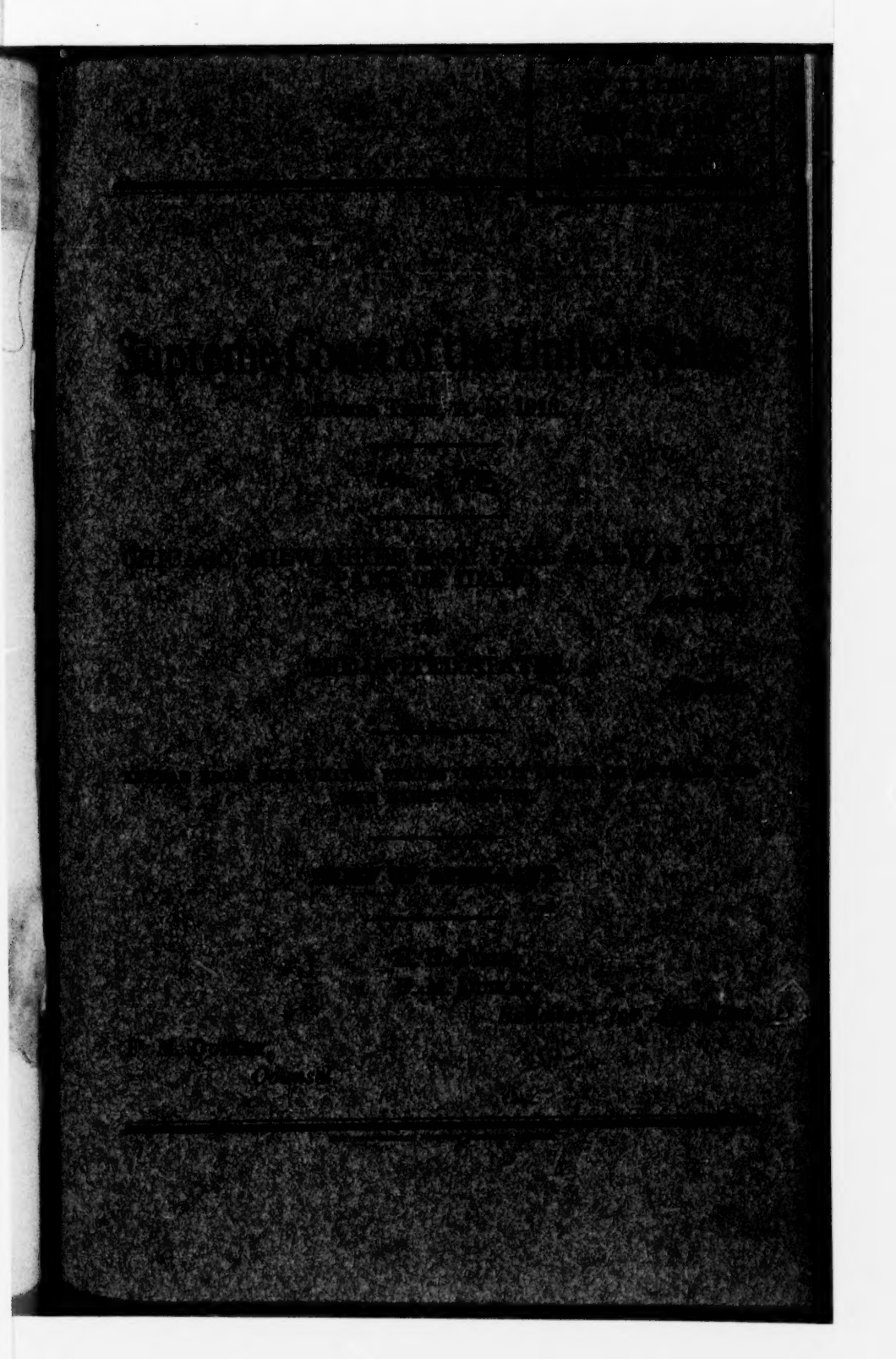
Coeur d'Alene - Trespass (Fire)
C.M.& P.S.R.R.Co. 1908

I	II	III	IV	V	VI	
Sec 7	NW¼ SE¼	Seedlings	10	35	D.F.	70
					W.Lar	30
	NE¼ SE¼	"	15	40	L.P.	100
	SE¼ SE¼	"	10	40	D.F.	40
					L.P.	40
					Lar.	20
	SW¼ SE¼	"	10	30	D.F.	100
8	NW¼ NW¼	Merchantable		23	Seedlings under	
	"	Seedlings	15	15	W.P.	25
					W.Lar.	25
					W.F.	20
					D.F.	20
					L.P.	10
	NE¼ NW¼	"	15	10	W.P.	50
					D.F.	30
					W.F.	20
	NE¼ NW¼	"	15	30	L.P.	100
	SE¼ NW¼	"	15	20	W.P.	50
					D.F.	40
					W.F.	10
	NW¼ SW¼	"	15	10	W.P.	70
					D.F.	20
					Others	10
	"	"	15	10	W.P.	20
					D.F.	40
					L.P.	40
	NE¼ SW¼	"	15	12	W.P.	50
					D.F.	40
					Others	10
	"	"	15	23	L.P.	80
					D.F.	10
					W.P.	10
	SW¼ SW¼	"	15	10	D.F.	40
					W.P.	20
					Lar.	20
					L.P.	20
	"	"	15	15	W.P.	50
					D.F.	40
					Lar.	10

EXPECTATION VALUE DAMAGE TO YOUNG GROWTH

Determined by Discounting from Value at Maturity. (cont'd. page 3)

VII	VIII	IX	X	XI	XII	XIII	XIV	XV
40	D.F	630	$2520.00	$ 163.24		$ 163.24		$
25	L.P.	300	1200.00	88.10		88.10	R.F. 5	20.00
25	D.F.	450	1800.00	116.60		116.60	D.F. 17.5 Tam. 10 Ced. 2	118.00
20	D.F.	270	1080.00	69.96		69.96	R.F. 20 Tam. 10	120.00
ier mature timber and would be destroyed in logging							R.F. 100 Tam. 225 Hem. 35 W.F. 35 W.P. 60 L.P. 50	2020.00
60	WP-DF-WLar	513	2052.00	158.13		158.13		
80	W.P.-D.F.	524	2096.00	162.64		162.64		
70	L.P.	630	2520.00	185.01		185.61		
70	W.P.- D.F.	917	3668.00	284.62		284.62	W.P. 33 R.F. 366 Ced. 136 W.F. 5	352.80
60	W.P.	546	2184.00	171.48		171.48	W.P. 185 R.F. 107 Ced. 5.2 W.F. 7.5	167.60
5	L.P.	15	60.00	4.40		4.40		
50	W.P.- D.F.	393	1572.00	121.98		121.98	W.P. 5 R.F. 8	52.00
30	L.P.	207	828.00	60.79		60.79		
10	WP-DF-LAR.	57	228.00	17.57		17.57	W.P. 5 R.F. 20 Tam. 5 W.F. 10	160.00
50	W.P.- D.F.	491½	1965.00	152.47		152.47		



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Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 176

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO,

Appellant,

vs.

THE UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This is an appeal from a decree affirming a decree of the United States District Court commanding the appellant to execute and deliver a stipulation, which is set forth in the decree of the trial court; and adjudicating that the appellee have and recover from the appellant $68,489 as damages. The facts upon which the legal rights of the parties are dependent, are largely, although not entirely, stipulated and are as follows:

March 21, 1905, the Commissioner of the General Land Office, acting under the directions of the Secretary of the Interior, notified the district land officers at Coeur d'Alene, Idaho, that he *"temporarily"* withdrew from all disposal, except under the mineral laws, all the vacant unappropriated public lands in certain designated town-

ships in that district. (Rec., 183-4.) The lands thus withdrawn included those involved in this action. While the notice transmitted to the district land officers did not state the purpose of the withdrawal, it was in fact in anticipation of the creation of a Forest Reserve. (Bill, Rec., 6; Plaintiff's Exhibit 1, Rec., 247-8.)

In January, 1906, appellant was duly incorporated under the laws of Idaho for the purpose of constructing a railway "to be run from some convenient point to be located on the east boundary line of the State of Idaho between the 46th and 47th degrees of north latitude (See stipulation correcting an error, Supplemental Rec., ...); thence extending in a general westerly direction to some convenient point to be located on the west boundary of the State of Idaho." (Rec., 184-6.)

February 17, 1906, a certified copy of the articles of incorporation and due proof of the organization of appellant company thereunder, were accepted by the Secretary of the Interior for filing and were, pursuant to the direction of the Secretary, filed in the office of the Commissioner of the General Land Office, under the provisions of the Act of Congress approved March 3rd, 1875 (18 Stat. 482). (Rec., 187-8.)

October 13, 1906, the articles of incorporation were amended so as to specify more definitely the route of the proposed road, the amendment being:

> "The railroad so to be constructed and operated is intended to be run from a point upon the boundary line between the states of Idaho and Montana near mile post number one hundred and forty-one (141) of the survey of said boundary line; thence extending in a westerly direction through Shoshone and Kootenai Counties and the Coeur d'Alene Indian Reservation, to some convenient point to be located on the west boundary line of the State of Idaho, within the limits of said reservation." (Rec., 188-9.)

October 25, 1906, a certified copy of the amendment

was sent to the Commissioner of the General Land Office "to be filed * * * under the provisions, and in order to obtain the benefits of the right of way Act of March 3, 1875." It was received by the Commissioner and, November 16, 1906, was sent by that official to the Secretary of the Interior who, on the same date, accepted the amendment for filing and caused it to be filed in the Commissioner's office. (Rec., 189-90.)

Between June 3rd and October 13th, 1906, appellant caused the line of its proposed railroad to be surveyed, staked out and located on the ground; and October 20th, 1906, the line so located was adopted by the Board of Directors. (Rec., 191.)

Maps of the line so located and adopted, conforming to the requirements of the departmental regulations under the Act of March 3, 1875, were prepared and duly filed in the District Land Office of Coeur d'Alene October 23rd, 1906, and were, immediately after their filing, forwarded by the District Land Office to the office of the Commissioner of the General Land Office. (Rec., 195-6.)

November 6, 1906, nearly two weeks after the filing of the amendment to the articles of incorporation and two weeks after the maps of definite location had been filed in the District Land Office and forwarded by the District Land Officers to the office of the Commissioner of the General Land Office, the President issued his proclamation creating the Coeur d'Alene Forest Reserve, under the provisions of Section 24 of the Act approved March 3, 1891. By its terms this proclamation excluded from the lands thus reserved the following:

> "This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists." (Rec., 196-7.)

March 18, 1907, appellant, as the result of additional

surveys, by resolution adopted a route differing in some particulars from that shown on the maps filed October 23, 1906; and March 20th, 1907, maps showing the newly adopted location, were filed in the Coeur d'Alene District Land Office, which maps were immediately after filing forwarded by the district officials to the office of the Commissioner of the General Land Office. (Rec., 198-9.)

As the result of still further surveys, a third route, differing slightly from those shown on each of the former maps, was, on May 6, 1907, adopted by resolution of appellant's directors. Maps showing this line were, May 10, 1907, filed in the District Land Office at Coeur d'Alene; and, after filing, were transmitted by the District Land officers to the office of the Commissioner of the General Land Office. (Rec., 202-3.)

The maps filed October 23, 1906, and the maps of amended route filed March 20th and May 10th, 1907, were severally accompanied with proper field notes and conformed in all respects to the regulations for the preparation of maps for filing under the Act of March 3, 1875. Each map contained proper certificates by the president and chief engineer of appellant, that by the president reciting that it had "been prepared to be filed in order to obtain the benefits of the Act of Congress approved March 3, 1875, entitled," etc. (Rec., 195, 202, 206.)

The routes shown upon the three maps began and ended at common points. The location of each is shown upon Exhibit X accompanying the stipulation (Suppl. Rec., ...); and it will be noted that the changes made by the successive amendments did not lengthen the route or affect the interests of the United States otherwise than beneficially.

The maps filed October 23, 1906, had not been approved by the Secretary of the Interior when they were superseded by the maps of March 20th, 1907; nor had these

been approved by that official when they in turn were superseded by those of May 10, 1907. And June 25, 1907, the maps and field notes which had been filed October 23, 1906, and March 20, 1907, respectively, were returned to the appellant because, as stated in the letter returning such documents, apparently superseded by those filed May 10, 1907. (Rec., 207-9.)

May 11, 1904, the Secretary of the Interior had promulgated certain regulations governing the procedure to be followed to secure a right of way through forest reserves under the Act of March 3, 1875, and the provisions of the Act of March 3, 1899. (30 Stat. 1233.) These regulations provided, among other things, as follows:

> "2. Whenever a right of way is located upon a forest or timber land reserve the applicant must file a stipulation under seal incorporating the following:
>
> (1) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.
>
> (2) That the applicant will cut no timber from the reserve outside the right of way.
>
> (3) That the applicant will remove no timber within the right of way, except only such as is rendered necessary by the proper use and enjoyment of the privilege for which application is made, and that he will also remove from the reservation, or destroy, under proper safeguards, as determined by this office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way, for such distance on each side of the central line as may be determined by the General Land Office to be essential to protect the forest from fire to the fullest extent possible.
>
> (4) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business. (Acting Secretary, September 2, 1902.)
>
> The applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, such

bond stipulating that the makers thereof will pay to the United States 'for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur.' A bond furnished by any surety company that has complied with the provisions of the Act of August 13, 1894 (28 Stat. 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond cannot be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given. * * *

16. Maps or plats of lines of route or station grounds lying wholly on unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps or plats will not dispense with the filing of maps or plats after the survey of the lands and within the time limited in the act granting the right of way, which map or plat, if in all respects regular when filed, will receive the Secretary's approval." (Rec., 177-182.)

April 26, 1906, the following additional regulation was promulgated:

"In accordance with the agreement made by and between the Department of the Interior and the Department of Agriculture, paragraph 2 of the circular of February 11, 1904 (32 L. D. 481), and paragraphs

3 and 68 of the circular of September 28, 1905 (34 L. D. 212), except the last clause in each relative to construction in advance of approval or specific permission, which will remain as at present, are hereby amended so as to read as follows:

'Whenever a right of way is located upon a forest or timber land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserve.'

This amendment applies to forest or timber land reserves only, not to national parks." (Rec., 183.)

In January, 1907, the chief law officer of the Forest Service wrote the Washington attorneys for appellant advising that the maps of location had been, after the creation of the reserve, referred to the Forester for report, and that "he will be obliged to require a stipulation for the Coeur d'Alene similar to that now being negotiated for the Helena Forest Reserve." (Rec., 209-10.)

May 10, 1907, Mr. George R. Peck signed and filed with the United States Department of Agriculture, Forest Service, the following writing:

"Whereas, the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulation and conditions to be prescribed by the Forester in respect to said railroad; such stipulation and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

This was signed "Geo. R. Peck, General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho." (Rec., 210-11.)

This paper is the principal, if not sole, basis of the appellee's claim of right to resort to a court of equity, as distinguished from a court of law, the contention being

that the promise therein made to execute and abide by a stipulation as nearly as practicable like the one executed with respect to the railway in the Helena National Forest, is one which the court will specifically enforce. Although this paper was signed by Mr. Peck as "General Counsel" for appellant, he was in fact not an officer of appellant company. (Rec., 379.) He was the General Counsel of the Chicago, Milwaukee & St. Paul Railway Company, the parent company, and had conducted negotiations with officers of the Interior and Agricultural Departments of the Government for rights of way over public lands sought by the subsidiary corporations, the Chicago, Milwaukee & St. Paul Railway Company of Montana, the Chicago, Milwaukee & St. Paul Railway Company of Washington, and appellant. (Rec., 369, 371.) With reference to the designation of himself as "General Counsel" of appellant in this writing, Mr. Peck testifies that he did not write this, and did not notice it at the time he executed the document. (Rec., 371.)

It is clearly established as a fact that Mr. Peck executed and delivered this document under a misapprehension of the facts. The Chicago, Milwaukee & St. Paul Railway Company of Montana had, some four months *after* the creation, by proclamation, of the Helena National Forest Reserve, complied with the provisions of the Act of March 3, 1875, granting rights of way through the public lands; and having made application for a right of way through the Helena National Forest, it was required to, and did, for the purpose of securing the approval of its maps of location through that Reserve, execute and file the stipulation attached to the complaint as Exhibit "D." (Rec., 38-42.) This was referred to in the Peck writing as the stipulation "executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana." The condi-

tions with respect to the right of way through the Helena Forest, to secure the approval of which, stipulation was signed, and those existing in the case of the Coeur d'Alene National Forest, were markedly different. In the Montana case the reserve had been created and was in existence *before* the railway company had become entitled to any rights under the Act of 1875. In the Idaho case the railway company had not only become entitled to the benefits of the Act of 1875 by the acceptance and filing of a certified copy of its articles of incorporation and proofs of its organization in the Interior Department, but it had definitely located and adopted the original line of its road and had filed proper maps thereof in the district land office, from which they had been forwarded to the General Land Office, nearly two weeks before the creation of the Coeur d'Alene National Forest. Mr. Peck testifies that he did not know of this difference in the conditions at the time he executed and delivered the writing of May 10, 1907; that he did not know at that time that the Coeur d'Alene Forest had not been created when the map was filed (Rec., 370); that he was first advised of this afterward, receiving the information from Mr. Field, General Counsel of appellant, at a time when he and Mr. Field were in Washington negotiating for the right of way through the reserve (Rec., 371-2); that the witness then informed some of the Government officials with whom such negotiations were being conducted, that he did not know at the time he executed the writing that the reserve had not been created by proclamation prior to the time appellant had filed its map of location; also that at the time he executed this paper he understood that the conditions with respect to the right of way through the Coeur d'Alene Reserve, were the same as those with respect to the right of way through the Helena Reservation; that Mr. Woodruff, one of the government

officers to whom such statements were made by the witness, and probably others, stated that if the stipulation had been signed by the witness under a misapprehension of fact, it ought not to be held against him, and that they would not so hold it, that it would not be equitable. (Rec., 372-5.)

The testimony of Mr. Peck is fully corroborated by Mr. Field, General Counsel of appellant, who fixes the time when he informed Mr. Peck that the Coeur d'Alene Reserve had not been created prior to the filing of the company's maps, as in October, 1907. (Rec., 379-380; see also pp. 380-1, 383-4.) He also testifies that this was the first time that the writing of May 10, 1907, was brought to his notice. (Rec., 380.)

This testimony is not controverted, although it was objected to as incompetent; and, assuming it to be admissible, the *fact* that Mr. Peck acted under a misapprehension of facts in executing the writing of May 10, 1907, is not questioned.

Upon the execution and delivery of this writing of May 10, 1907, there was endorsed thereon by the Acting Forester, the following notation:

> "Approved and advance permission given to construct, subject to ratification hereof by the Company.
>
> Dated May 10, 1907.
>
> (Signed) JAMES B. ADAMS,
> *Acting Forester.*"
> (Rec., 37, 75, 211.)

This stipulation never was ratified by the company; on the contrary, when, in the following October, it was brought to the notice of its officials, the company at once took the position that it had been executed under a mistake of fact and ought not to be insisted upon by the government, a position acquiesced in by at least one of the representatives of the government. (Rec., 372-5, 380-1, 383-4.)

On the day that the paper was executed by Mr. Peck, May 10th, and although there had been no ratification thereof by the company, the Chief of the Office of Lands of the Forest Service sent a telegram to the Forest Supervisor of the Coeur d'Alene Forest, saying:

> "Advance permission given to-day St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows." (Rec., 211-2.)

This telegram was confirmed by letter the following day. (Rec., 212.)

Between the 1st and 15th of October, 1907 (Rec., 379), Mr. Peck and Mr. Field were in Washington, conducting negotiations with officers of the government with reference to rights of way for the Washington and Idaho corporations through the forest reserves in those states, and at this time the Peck stipulation was first brought to Mr. Field's notice. This also appears to be the first notice thereof had by any officer of appellant; and, as stated, was the first time that Mr. Peck was advised as to the difference between the situation of the right of way through the Helena Reserve and that of the right of way through this reserve; and the officers were at once advised that the Peck stipulation had been signed under a mistake of fact and equitably should not be asserted by the Government. (Rec., 368-384.)

October 24, 1907, the Chief of the Office of Lands of the Forest Service transmitted to the Supervisor of the Coeur d'Alene Forest a form of stipulation with instructions to forward it to appellant for execution. The stipulation thus forwarded is that attached to the complaint as Exhibit "G"; which the bill prays that appellant be required to execute as a compliance with the Peck stipulation. (Rec., 22-3, 44-49, 219.)

This stipulation was delivered to appellant about No-

vember 15, 1907; whereupon appellant informed the Supervisor that it would not execute such stipulation, but would await the outcome of negotiations then pending with the officers of the Interior Department and of the Department of Agriculture. (Rec., 225.)

December 2, 1907, Mr. Peck, acting for appellant, personally advised the Forester at Washington that he, Peck, was not authorized to make any different agreement in respect to the right of way through the Coeur d'Alene National Forest, than that which had been made for a right of way through the Yakima National Forest; at the same time Mr. Peck requested some assurance that appellant should not be disturbed in its work of construction through the Coeur d'Alene National Forest. Pursuant to this request the following instructions were telegraphed to the Forest Supervisor of the Coeur d'Alene Forest:

> "WASHINGTON, D. C., Dec. 2, 1907.
>
> Chicago, Milwaukee & St. Paul claims right to construct without stipulation and without paying for timber destroyed. While negotiations are pending allow construction to proceed. Friendly suit probable." (Rec., 225-6.)

There was from this time, at the least, no misunderstanding by the government of the attitude of appellant with reference to signing the stipulation, Exhibit "G." Mr. Wells, Law Officer of the Forestry Service, on this day prepared a memorandum of the conflicting views and directed that copies thereof should be sent to the Chief Inspector, to the Supervisor and to Mr. Peck. (Rec., 226-9.) And whatever work was done by the appellant after this time, if not after October, the date of the interviews between the department officials and Messrs. Peck and Field, was permitted by the government with full knowledge that the railway company did not consider itself bound by the Peck stipulation, or under any obligation to pay for timber taken from the right of way or

from the extra widths which the Forestry Service desired it to clear for the protection of the forest.

August 14, 1908, the Acting Secretary of the Interior, pursuant to the request of the Department of Agriculture, notified appellant that the Secretary of the Interior would not approve the maps of location until it had satisfied the Department of Agriculture by executing the stipulation, Exhibit "G." (Rec., 229-30.)

October 10, 1908, the Secretary of the Interior again wrote the appellant notifying it "that unless the stipulation is duly executed and filed within fifteen days from the date of this letter," the maps would be rejected and stricken from the files of the Department. And October 29th, the stipulation not having been executed or filed by the railway company, the Secretary of the Interior again wrote the company, saying:

> "The stipulation has not been filed, and the time allowed therefor having expired, the application is hereby rejected, the maps and papers are stricken from the files of this Department and are herewith enclosed." (Rec., 233-4.)

The maps filed by appellant May 10, 1907, were returned to appellant with this letter. The sole reason for refusing to approve the maps was, as clearly and distinctly stated in the letters, the refusal of the railway company to execute and file the demanded stipulation, Exhibit "G." (Rec., 234.)

Appellant began the construction of that part of its road extending through the Coeur d'Alene Forest about July 10, 1907. Between that time and December 3, 1907, the date of the formal notification to the government that it did not consider itself bound by the Peck agreement or legally liable for timber cut, it expended in the construction of its railway across the reserve, approximately $523,000. The grading and track laying through the reserve were completed about December 1, 1908, at an ex-

penditure of approximately $3,873,813.62, the expenditures between the date of the formal notification to the government of the company's position, and December 1, 1908, being thus approximately $3,350,813. The road was completed about July 31, 1909, at a further cost of $926,186.38, making the total cost of the railway through the reserve approximately $4,800,000, of which $4,277,000 were expended after notice to the government of the railway company's contention that it was entitled to the benefits of the Act of 1875, and under no legal obligation to pay for timber cut. (Rec., 234-5.)

The government had full knowledge of the progress of this work, and not only did nothing to interfere therewith, but directed and required the company to cut and remove the timber from extra widths outside of the right of way, for the protection of the forest. This extra cutting was done by the company at the request of the government, and for its exclusive benefit. See,

Letter of March 9, 1908, Record, p. 235,
Letter of March 17, 1908, Record, p. 236,
Letter of April 27, 1908, Record, p. 237,
Letter of May 15, 1908, Record, p. 238,
Letter of July 10, 1908, Record, p. 239,
Letter of July 23, 1908, Record, p. 242,
Letter of July 11, 1908, Record, p. 243,
Letter of August 6, 1908, Record, p. 244,
Letter of August 13, 1908, Record, p. 245,
Testimony of Mr. Skeels, Record, pp. 254, 275-6.

The bill of complaint which was not filed until *June 25, 1909*, and after the work was practically completed, alleged the order of withdrawal made by the Commissioner of the General Land Office March 21, 1905, charging that such withdrawal was made "pending a decision of the President as to the advisability of creating a National Forest thereof"; the proclamation creating the Forest November 6, 1906; the promulgation of regulations by the Interior Department February 11, 1904, with refer-

ence to the acquisition of rights of way over forest and timber land reserves; the filing by appellant of its maps of location October 23, 1906, March 20, 1907, and May 10, 1907; that when the map of March 20, 1907, was filed, that of October 23, 1906, which had not been approved, was returned to appellant, and that when the map of May 10, 1907, was filed the one of March 20, 1907, which also had not been approved, was similarly returned; and that the map filed May 10, 1907, "has never been approved by the Secretary of the Interior *for the reason that the defendant has neglected and refused to execute and file, or execute or file, the stipulation and bond prescribed and required as hereinafter set forth.*" The bill further alleged the execution of the writing by Mr. Peck May 10, 1907, and that the Forester, in reliance thereon, gave advance permission to appellant to proceed with the work; and charged that thereafter appellant availed itself of such permission and proceeded with the construction of its railway through the reservation, prosecuting the same continuously until December 3, 1907, when, as alleged, Mr. Peck notified the Forester that appellant claimed it should not be required to file any stipulation whatever. In connection with the allegation of the giving of the writing by Mr. Peck May 10, 1907, the bill exhibits a copy of the stipulation with respect to the right of way through the Helena National Forest, the conditions and stipulations of which were, as nearly as practicable, according to the promise expressed in the Peck writing, to be embodied in the stipulation to be executed with reference to the Coeur d'Alene Forest.

The bill then charged that there was prepared by the Secretary of Agriculture a stipulation, a copy of which is attached to the bill as Exhibit "G," and which it is charged was "as nearly as practicable like the said stipulation executed by the defendant in respect to the right

of way through the Helena National Forest"; and that appellant was required by the proper officers to enter into and execute the same for the protection of the Coeur d'Alene Forest; and that October 29, 1908, upon its failure so to do within a time fixed, the map of location filed by appellant was rejected and stricken from the files by the Secretary of the Interior.

The bill further charged that at all times since the President's proclamation of November 6, 1906, creating the Forest, appellant wrongfully, illegally, and without any authority from the government, except under the terms and conditions of the Peck writing of May 10, 1907, had cut and caused to be cut on lands in the National Forest 8,996,530 feet of timber, that such timber had been cut on a 200-foot right of way and an additional strip of 100 feet width abutting on the up-hill side of the right of way; that appellant had cleared and was clearing such land for the purpose of constructing a railway, and had constructed and was constructing a railway; that it had conducted, and was so conducting, its operations as to destroy a large amount of small timber and small growth; that in its work it had thrown and rolled, and was throwing and rolling, great quantities of rock, earth, gravel and debris into the St. Joe river, thereby obstructing and rendering the same unfit for navigation and log driving until such obstructions should be removed; and that, through lack of proper precautions against fire, it had set numerous fires along its right of way, burning 4,045,700 feet of merchantable timber and 1,344½ acres of seedlings upon complainant's lands.

The bill further charged that appellant threatened and intended to continue to disregard the requirements of the Secretary of the Interior and of the Secretary of Agriculture, and without signing the demanded stipulation and without awaiting the approval of its map of loca-

tion, and without any other license, permit or authority from the government, to cut the complainant's timber on the reserved land, and commit other unauthorized acts of trespass and waste, and to continue the construction and operation of [illegible]ilway over the reserve; that unless enjoined, app[illegible]ould carry out such threats, repeat the wrongs an[illegible]uries alleged, and thereby inflict irreparable damage and injury upon complainant and the public interests; that the wrongful conduct of appellant involved, and would continue to involve, long continuing and damaging trespasses for the redress of which there existed no adequate remedy at law; that they constituted and were a public nuisance injurious to complainant and its citizens. (See Bill of Complaint, Rec., 6-34.)

Although the bill appeared thus to point to injunctive relief as the desired remedy, the prayer practically disavowed all desire for such relief except as a means to compel appellant to execute the stipulation, Exhibit "G." This extraordinary prayer is: (1) that appellant be required to execute the stipulation, Exhibit "G"; (2) that it be required to cease from obstructing the navigability of the St. Joe River; (3) that it be required to refrain from continuing the alleged wrongs and injuries, and from cutting any timber and constructing and operating its railway within the bounds of the Coeur d'Alene National Forest, *"until it shall have executed and filed with the Secretary of the Interior the said required stipulation and until it shall have complied with the laws of plaintiff and its said so-called map shall have been approved by the Secretary of the Interior"; or* that it be perpetually enjoined from continuing the alleged wrongs and injuries, and from cutting any timber and constructing or operating its railway within the bounds of the Forest; (4) that complainant be accorded its damages. (Rec., 34-36.)

The bill did not charge that appellant had ever filed a certified copy of its articles of incorporation or proofs of organization requisite to entitle it to the benefits of the Act of March 3, 1875, or had otherwise complied with the laws of the United States sufficiently to have authorized the granting to it by the officers of the Interior Department or of the Department of Agriculture, of a right of way or of the privilege of cutting timber; and although the bill was drafted upon the theory that by the approval of the maps of location, such rights would have vested in appellant, it totally failed to charge the existence of matters which were essential to the jurisdiction of the departmental officers to confer upon appellant, and to the power of appellant to receive, any rights in the Forest.

The consequences of these omissions was to leave the bill one purely and simply against trespass and waste; and to render the various allegations as to the order of withdrawal, the proclamation creating the Forest, the filing of the maps, the Peck stipulation, the demand that appellant execute a stipulation similar to the Helena Forest stipulation, and its refusal so to do, totally immaterial and impertinent to the issues.

Exceptions were filed by appellant to parts of the bill as impertinent, viz.: to allegations with respect to the commissioner's order of withdrawal; to the allegations of the eighth paragraph with reference to the Peck stipulation and the giving of advance permission to appellant by the departmental officers in reliance thereon, and various allegations in other portions of the bill referring to this Peck stipulation as a material factor; to the allegation in the ninth paragraph of the bill that the stipulation demanded of appellant was reasonable, necessary or as nearly as practicable like the Helena Forest Stipulation; to the allegation that the Secretary

of the Interior had determined that the public interests would be injuriously affected if the demanded stipulation were not executed and filed; to the allegation of rejection of appellant's map by the Secretary of the Interior; and to certain other allegations not necessary to note here. (Rec., 53-8.) These exceptions were all denied. (Rec., 58.)

Appellant also demurred to parts of the bill and to the entire bill, as follows:

(1) To the allegations with respect to depositing debris in the St. Joe River, upon the grounds (a) that complainant had no interest in such matter; (b) that as to such matter defendant was answerable only to the State of Idaho, and (c) that complainant was not entitled to relief with respect thereto.

(2 and 3) To the allegations with respect to the injuries by fire, upon the ground that as to such matters complainant had an adequate remedy at law, and there was no equity therein.

(4) To the allegation of cutting timber upon the 200-foot right of way, upon the grounds (a) that it was acting within its legal rights, and (b) that there was no equity in said matter.

(5) To the allegation of cutting timber outside of the 200-foot right of way, upon the ground that there was no equity in said matter.

(6) To the allegations that defendant had cleared and was clearing ground for the construction of a railroad and had constructed and was constructing such railroad, upon the ground that there was no equity in such matter.

(7) To the bill as an entirety, upon the ground that it was multifarious, the complainant having joined therein matters of legal with matters of equitable cognizance; also a cause of action for the obstruction of a highway,

with a claim for damages arising from negligent acts, and a cause of action for wilful waste and continuous trespass.

(8) To the bill as an entirety for that it was without equity and did not set forth matters entitling complainant to equitable relief. (Rec., 49-53.) This demurrer was overruled. (Rec., 59.)

Appellant thereupon answered. (Rec., 59-100.) As no question of the sufficiency of the answer is involved, it is unnecessary to abstract its contents. It set forth facts showing a full compliance by appellant with the right of way Act of March 3, 1875; that the Peck stipulation was signed under a misapprehension of fact, and its execution was never ratified by appellant; that the complainant with full knowledge of all facts and with knowledge that appellant had refused to execute the demanded stipulation, and claimed the legal right to construct its railway through the reserve under the provisions of the Act of March 3, 1875, had failed to take any action until the appellant had completed its work, expending thereon more than $4,000,000; that complainant was thereby estopped to demand that defendant execute the demanded stipulation; and that its demands were stale and without equity.

The evidence in the case, so far as it relates to record matters and correspondence, is embodied in a stipulation of facts. (Rec., 176-247.) Testimony was offered on behalf of the government as to the quantity and value of the timber destroyed, and by appellant as to the value thereof. Appellant offered no testimony as to the quantities, but contented itself with objections to the competency of that offered by the government—objections which it still relies upon. If these objections were and are, as we believe, well founded in law, so much of the decree as requires payment for such timber in the total

amount of $62,989 must be vacated, even if the court should be of opinion that appellant was without legal right to the right of way. The government further offered testimony as to the depositing of debris in the St. Joe River and the cost of removing the same. Appellant objected to the competency of this testimony; and standing upon such objection, offered no evidence as to this matter. If these objections are well founded, so much of the decree as requires the payment of $5,500 upon this account must be vacated, regardless of the ruling as to other matters.

The appellant offered evidence showing that the execution by Mr. Peck of the stipulation of May 10, 1907, was under a mistake of fact; and the government offered some rebuttal evidence with respect thereto.

Prior to the hearing in the trial court, specifications of objections to the admission of evidence were duly filed. (Rec., 101-136.) These objections, however, were disregarded by the trial judge who made no specific ruling thereon, although so far as they were based upon the insufficiency of the pleadings, the opinion and decree necessarily involved a ruling adverse to appellant.

ASSIGNMENTS OF ERROR.

I.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT APPELLANT IS ENTITLED TO THE RIGHT OF WAY THROUGH THE FOREST RESERVE UNDER THE ACT OF MARCH 3, 1875, AND TO TAKE MATERIAL OF EARTH, STONE AND TIMBER FROM ADJACENT LANDS FOR CONSTRUCTION PURPOSES WITHOUT PAYMENT THEREFOR.

Under this assignment we shall consider the following errors specified in the assignment of errors and prayer for reversal:

(a) The said United States Circuit Court of Appeals erred in failing to hold that the matter hereinafter set forth was immaterial, and that defendant's objection thereto should have been sustained, the said matter being that contained in the 3rd paragraph of the stipulation of facts entered into between the parties hereto, subject to all objections as to competency, materiality and relevancy, viz.:

> "That on March 21, 1905, the Commissioner of the General Land Office transmitted to the register and receiver of the United States District Land Office at Coeur d'Alene City, Idaho, the following letter which (omitting formal parts and signatures) reads as follows:
>
> 'By direction of the Secretary of the Interior, I hereby temporarily withdraw from all disposal, except under the mineral laws, all the vacant unappropriated public lands in the following described area in your district:
>
> All of townships 42 N. and 43 N., lying east of Range 2 E.
>
> All of township 44 N., lying east of Range 3 East.
>
> All of township 45 N., lying east of Range 4 East.
>
> All of townships 46 N. and 47 N., lying east of Range 2 East.
>
> All of Boise Meridian, Idaho.
>
> Note this withdrawal upon the records of your office.'
>
> That at the same time he transmitted to the Register and Receiver of the United States Land Office at Lewiston, Idaho, a similar letter but describing only lands in townships 37, 38, 39, 40, 41 and 42 north." (39th Assignment of Error, Rec., 630-31.)

(b) The Circuit Court of Appeals erred in failing to hold that the matter hereinafter set forth was immaterial, and that defendant's objection thereto should have been sustained, the said matter being the following contained in the 12th paragraph of said stipulation of facts, viz.:

> "That May 10th, 1907, George R. Peck, as General Counsel for the Chicago, Milwaukee & St. Paul

Railway Company of Idaho, filed with the United States Department of Agriculture Forest Service a paper writing as follows, to wit:

United States Department of Agriculture Forest Service.

Chicago, Milwaukee & St. Paul Railway Company of Idaho,—Railroad (Interior)—Coeur d'Alene National Forest, Idaho.

'WHEREAS, the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the Company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the Company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the Company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana. Date May 10, 1907. (Signed) Geo. R. Peck, General Counsel for the Chicago, Milwaukee & St. Paul Railway Company of Idaho.'

And thereupon the United States Acting Forester made upon said paper writing the following indorsements, to wit:

'Approved and advance permission given to construct, subject to ratification hereof by the Company.

Date: May 10, 1907.

JAMES B. ADAMS,
Acting Forester.'

That thereupon on May 10, 1907, G. F. Pollock, Chief of the Office of Lands of the Forest Service in the United States Department of Agriculture, transmitted to Richard H. Rutledge, Forest Supervisor of the Coeur d'Alene National Forest, the following telegram, to wit (formal parts and signatures omitted):

'Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut. Letter follows.

POLLOCK.'

And on May 11, 1907, said Pollock transmitted to

said Rutledge the following letter, to wit (formal parts and signature omitted):

'The following telegram in this case was sent to you today:

"Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulation. Supervise clearing and piling and scale all timber cut. Letter follows."

A blue-print showing the route has been sent to you under separate cover. Enclosed with this letter is a copy of the preliminary stipulation entered into today at this office with Mr. Geo. R. Peck, General Counsel for the road. There is also enclosed a copy of the stipulation executed by the Company in respect to its road through the Helena National Forest. The stipulation to be executed by the Company in this case will be as nearly as practicable like that executed in the Helena case.

Please examine carefully the enclosed copy of the Helena stipulation and at the earliest practicable date submit your report on Form 964, giving particular attention to the question of the width necessary to be cleared in order to protect the forest from fire.

By separate letters, you will be fully instructed in regard to the cutting and payment for timber, and how to prepare your part of the report affecting the timber.'"

(40th Assignment of Error, Rec., 631-634.)

(c) The said Circuit Court of Appeals erred in failing to hold that the letter of March 14, 1905, with the endorsements thereon, Defendant's Exhibit 1, was incompetent. Said exhibit, excluding the certain formal parts and signatures, is as follows:

"As a result of investigation by the Bureau of Forestry in the State of Idaho, I have the honor to recommend the immediate withdrawal of the following described lands, pending the creation of the proposed Shoshone Forest Reserve:

Township 47 north, ranges 3 to 6 east; township 45 north, ranges 5 to 9 east; township 44 north, ranges 4 to 9 east; township 42 north, ranges 3 to

9 east; township 42 north, ranges 3 to 11 east; township 41 north, ranges 4 to 11 east; township 40 north, ranges 7 to 11 east; township 39 north, ranges 7 to 14 east; township 38 north, ranges 8 to 9 east; township 37 north, ranges 7 to 9 east; Boise Principal Meridian."

The endorsement on the foregoing letter in words and figures reads as follows:

"1006.

Department of the Interior: Received Mar. 3, 1905.

L. & R. R. Div. Acting Secretary of Agr. March 14, 1905.

Recommends the withdrawal of described lands for the proposed Shoshone Forest Reserve, Idaho. J. I. P.

Department of the Interior, March 20, 1905.

U. S. General Land Office,

Received Mar. 21, 1905. 4770.

48961.

Acknowledged and respectfully referred to the Commissioner of the General Land Office with instructions to withdraw the lands herein described in accordance with the recommendation of the Acting Secretary of Agriculture, unless there is some good reason why such action should not be taken.

Advise the Department of action taken with return of this letter.

E. A. HITCHCOCK,
Secretary."

(41st Assignment of Error, Rec., 634-5.)

(d) The said Circuit Court of Appeals erred in failing to hold that the order of withdrawal made by the Commissioner of the General Land Office, March 21, 1905, was void.

(42nd Assignment of Error, Rec., 635-6.)

(e) The said Circuit Court of Appeals erred in failing to hold that the order of withdrawal made by the Commissioner of the General Land Office March 21, 1905, even if valid as to settlers, did not exclude the lands with-

drawn from the operations of the Act of March 3, 1875, granting rights of way to railway companies through the public lands of the United States.

(43rd Assignment of Error, Rec., 636.)

(f) The said Circuit Court of Appeals erred in failing to hold that the defendant had, prior to November 6, 1906, the date of the President's proclamation creating the Coeur d'Alene Forest Reserve, by its compliance with the terms and provisions of the Act of March 3, 1875, acquired the grant of a right of way 200 feet in width with the privilege of taking material of earth, stone and timber for the construction of its railway over and across the lands included in such forest reserve, which was prior in time and which precluded the extinguishment of the rights of the Railway Company by the creation of such reserve.

(44th Assignment of Error, Rec., 636.)

(g) The said Circuit Court of Appeals erred in holding that the making of amended locations of said railroad and the filing of maps thereof in the United States District Land Office rendered the grant of right of way and of the privilege of taking material of earth, stone and timber from lands adjacent to the right of way for the purpose of constructing said road, subsequent in time to the creation of said Forest Reserve.

(45th Assignment of Error, Rec., 636-7.)

(h) The said Circuit Court of Appeals erred in holding that a forest reservation, created by proclamation of the President, excepted and excluded the reserved lands from the operation of the Act of March 3, 1875, granting rights of way to railway companies with the privileges of taking material of earth, stone and timber from the public lands adjacent to the line of the road for the construction thereof.

(46th Assignment of Error, Rec., 637.)

(i) The said Circuit Court of Appeals erred in failing to hold that the grant to the Railway Company of a right of way through said forest reserve, with the privilege of taking material of earth, stone and timber adjacent to the line of its road for the construction thereof was, by the terms of the President's proclamation of November 6, 1906, creating said reserve, excluded from such reservation.

(47th Assignment of Error, Rec., 637.)

(j) The said Circuit Court of Appeals erred in holding that the provisions of the Act of Congress, approved March 3, 1899, namely, "that in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby," operated either as a grant, or vested in the Secretary of the Interior authority to make a grant, of such right of way, or that it authorized the Secretary of the Interior to prevent the location and construction of railways in forest reservations by railway companies who had accepted the grant made by Congress by the Act of March 3, 1875, by duly filing a certified copy of their articles of incorporation and due proofs of their organization in the office of the Commissioner of the General Land Office.

(48th Assignment of Error, Rec., 637-8.)

(k) The said Circuit Court of Appeals erred in holding that the provision of the Act of March 3, 1899, authorized the Secretary of the Interior to impose conditions upon the approval of maps of railway location by railway companies who had become grantees under the provisions of the Act of March 3, 1875, requiring such railway companies to purchase and pay for right of way,

or for timber standing thereon, or for material of earth, stone and timber taken from adjacent lands of the United States for the purpose of constructing such railway.

(49th Assignment of Error, Rec., 638.)

(l) The said Circuit Court of Appeals erred in holding that the Secretary of the Interior had power, under the provisions of the Act of March 3, 1899, to limit within the boundaries of forest reserves the grants made by the Act of March 3, 1875, to a grant of land only for right of way purposes.

(50th Assignment of Error, Rec., 638.)

(m) The said Circuit Court of Appeals erred in failing to hold that the defendant had the right to cut and remove without charge therefor all timber growing upon its right of way.

(51st Assignment of Error, Rec., 638.)

(n) The said Circuit Court of Appeals erred in failing to hold that the defendant could not lawfully be required to enter into any stipulation with the United States as a condition precedent to obtaining the approval of its right of way maps filed pursuant to the provisions of the Act of March 3, 1875, and the rules and regulations of the Interior Department of the United States promulgated thereunder.

(38th Assignment of Error, Rec., 629-30.)

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY DEPOSITING DEBRIS IN STREAMS.

Under this assignment we shall consider the following errors specified in the assignment of errors and prayer for reversal:

(a) The Circuit Court for the District of Idaho erred in denying the exception, upon the ground that such matter was impertinent, filed by appellant to the following matter contained in the 10th paragraph of the bill of complaint, beginning at about the twelfth line after the first series of land descriptions contained in said paragraph, namely:

> "And has thrown, rolled and deposited, and is throwing, rolling and depositing great quantities of rock, earth, gravel and debris in the St. Joseph River in divers places, adjacent to said pretended right of way, whereby the St. Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log-driving, and will continue to be unfit and useless for purposes of navigation and log-driving until said rock, earth, gravel and debris is removed therefrom."

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court denying such exception.

(1st Assignment of Error, Rec., 595.)

(b) The said Circuit Court erred in overruling the demurrer to the portion of said bill set forth in Assignment No. 1, which demurrer was interposed upon the following specified grounds, namely:—(a) that the said complainant had no interest in said matter; (b) that the said defendant was not answerable as to said matters to the said complainant but to the State of Idaho; and (c) that the said complainant was not entitled to any relief with respect to said matters.

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court overruling such demurrer.

(2nd Assignment of Error, Rec., 595-6.)

(c) The District Court for the District of Idaho, Northern Division, erred in failing to sustain the defendant's objections to the questions propounded to the

witness Dorr Skeels as to the navigability for logs of the East Fork and Little North Fork streams and in admitting over said objections and considering the testimony given by said witness in response to such questions, for the reason that said testimony was irrelevant, immaterial and incompetent under the issues in this case.

The substance of the testimony to which this assignment relates is as follows:

> Coming down the river from the junction of the Little North Fork and East Fork, the first obstruction of which I prepared a memorandum was in the river at a point a little above the east portal of Tunnel No. 30 in the SE¼ of Sec. 7, Tp. 46 North, Range 6 East. The rock at that point was thrown into the creek, filling the channel completely from bank to bank at the normal stage of water and backing the water for a distance of about 200 feet. The next obstruction coming down the river was at the east portal of Tunnel No. 31 on the line between sections 7 and 18, partly in each section, Tp. 46 N., R. 6 East. The boulders and broken rock were thrown from the right of way into the channel so as to completely fill it and back the water into the stream for a considerable distance, making log-driving impossible. The next obstruction of which I have any memorandum was at the west portal No. 31 in the NE¼ of Sec. 18, Tp. 46 N., R. 6 E. Boulders and broken rock were thrown from the fill at the portal of the tunnel into the channel of the stream so as to completely fill it and back the water into the stream for a distance of several hundred feet, making log-driving impossible. The next obstruction was from 100 ft. to 200 ft. below the west portal of Tunnel No. 32 in the SW¼ of Sec. 18, Tp. 48 N., R. 6 E. The rock fills the channel of the creek for 200 ft. along its course and has already formed a big jam of driftwood above it, the rock in the stream rendering log-driving impossible. The next point was at the west portal of No. 33 in Sec. 24, Tp. 46 N., R. 5 E. The rock was thrown down along the base of a large fill, filling the creek channel completely with broken rock for a length along the creek of 250 ft., blocking up the water for 700 ft. above the obstruction, rendering

log-driving impossible. All of the distance for which the water is backed and the reference to filling the stream is at the normal stage of water. The next obstruction is about three-eighths of a mile and below the west portal of Tunnel No. 33 in SE¼ of Sec. 46 N., R. 5 E. Several large masses of rock ten to twenty feet in diameter have been thrown into the creek and filled its bed for a width of fifty feet, rendering the stream unfit for log-driving. The next obstruction is a short distance above the east portal of Tunnel 34, SW¼ of Sec. 25, Tp. 46 N., R. 5 E.; several large boulders from 8 to 16 ft. in diameter have been thrown from the right of way into the creek forming a complete obstruction to log-driving. The next obstruction was about a mile from Avery where the creek channel has been completely filled by a fill made to form a right of way and the channel of the creek destroyed and thrown into the surrounding country to make its own channel.

The railroad ran along the course of the river and they built the fill out to fill the river, throwing the stream out over the lower bank to cut its way around the fill.

I know of my own knowledge that these obstructions were made by the Chicago, Milwaukee & St. Paul Railway Company of Idaho.

The Government has more than 2,000,000 ft. of merchantable timber on the waters of this stream above the rock obstructions to which I have testified. For more than half of this timber the sole means of transportation is by the North Fork of the St. Joe River. For the remaining part of the timber which I mention, the best and cheapest method of transportation is by the North Fork of the St. Joe River, although it might at great cost be gotten up to the right of way and loaded on the railroad and transported in that manner.

NOTE: All testimony concerning the condition of the river and obstructions therein was received subject to appellant's objection that there was no equity in such matters and that such evidence was incompetent and immaterial under the issues in this case. These objections were included in the specifications of objections to the

admissions of evidence filed in the District Court but upon which the court made no specific ruling. It, however, considered and gave effect to such objectionable testimony in the opinion filed and in the decree.

And the Circuit Court of Appeals erred in sustaining the action of the said District Court with respect to such objections and objectionable testimony.

(3rd Assignment of Error, Rec., 596-599.)

(d) The said District Court erred in failing to sustain the defendant's objection to the interrogatories propounded to the witness Rutledge relative to the condition of the St. Joe River and its tributaries, which objection was upon the ground that such matter was incompetent under the issues in this case and that any damages, if the navigability of the stream was impaired, would be properly the subject of an action at law and could not be gone into in this suit in equity.

The witness Rutledge, notwithstanding the defendant's objections, gave testimony of the same character and import as that of the witness Skeels relating to the depositing of rock and debris in said river and its tributaries.

And the said Circuit Court of Appeals erred in sustaining the action of said District Court with respect to such objection and objectionable testimony.

(4th Assignment of Error, Rec., 599-600.)

(e) The said District Court erred in failing to sustain the defendant's objection to the interrogatories propounded to the witness Hamilton relative to the condition of the North Fork and other streams and their suitability for driving logs, which objection was interposed upon the ground that such matter was incompetent under the issues in this case and afforded no ground for equitable relief.

The witness Hamilton, notwithstanding defendant's objections, gave testimony of the same general character

and import as the testimony of the witness Skeels relating to the depositing of rock and debris in said river and its tributaries.

And the said Circuit Court of Appeals erred in sustaining the action of said District Court with respect to such objection and objectionable testimony.

(5th Assignment of Error, Rec., 600.)

(f) The said District Court erred in finding that the plaintiff was entitled to recover of the defendant the sum of $5,500 on account of rock and other debris thrown into the St. Joe River and its tributaries.

And the said Circuit Court of Appeals erred in affirming such finding by the said District Court.

(6th Assignment of Error, Rec., 600-1.)

III.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY THE DESTRUCTION OF TIMBER BY FIRE.

Under this assignment we shall consider the following errors specified in the assignment of errors and prayer for reversal:

(a) The Circuit Court for the District of Idaho, Northern Division, erred in overruling a demurrer interposed by the defendant to the following portion of the bill of complaint herein, namely: To so much of said bill as charges that this defendant, through lack of proper precaution against fire, has set and caused to be set numerous fires along, upon and adjacent to said pretended right of way, and has thereby burned and destroyed, and caused to be burned and destroyed, a large amount of timber, young growth and seedlings, to wit: 4,045,700 feet board measure of merchantable timber

and 1,344½ acres of seedlings upon the land specifically described in said bill of complaint.

Which demurrer was interposed upon the specified ground that there was no equity in such matter and that the said complainant had as to such matters a plain, speedy and adequate remedy at law.

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court overruling such demurrer.

(7th Assignment of Error, Rec., 601.)

(b) The said Circuit Court erred in overruling the demurrer to the following portion of the bill of complaint herein, namely: To so much of said bill as charges that this defendant is setting and causing to be set, fires along, upon and adjacent to said pretended right of way; and is burning and destroying and causing to be burned and destroyed, great quantities of timber, young growth and seedlings to the damage of said complainant, which demurrer was interposed upon the assigned grounds that there was no equity in such matters, that as to such matters, if true, there was a plain, speedy and adequate remedy by the ordinary process of law; that said acts, if done unlawfully or intentionally, were punishable by indictment and under the laws of the United States defining and providing for the punishment of misdemeanors and felonies.

And the said Circuit Court of Appeals erred in affirming the order of the said Circuit Court overruling said demurrer.

(8th Assignment of Error, Rec., 601-2.)

(c) The said District Court erred in overruling the defendant's objection to the introduction of all testimony relative to fires, interposed upon the ground that whatever damages resulted from fires would have to be recovered in an action at law, and that a court of equity

was without jurisdiction to pass upon such matters, and that such testimony was incompetent under the issues in this case.

The substantial part of the testimony given, notwithstanding such objection, and to which this assignment relates, is as follows:

The witness Dorr Skeels testified:

> I know of my own knowledge of fires having been started on the right of way in the summer of 1908. One started at Burns & Jordan's camp; one started in what they call the "loop" at a point where this railroad crosses Kelley Creek; one started at a point a short distance above Sturtevant & Proctor's camp in the N. E. ¼ of Section 7, Tp. 46 N., R. 6 East, and several other fires started along there for which I cannot give a definite location at present.
>
> The fire that started near the Burns & Jordan's camp burned over about 30 acres; the worst fire started in the clearing made at Kelly Creek Bridge and burned north and east to the summit of the Bitter Root Mountains. It covered the greater part of four sections. The fire killed the timber and young growth.
>
> I did not make an estimate of the timber that was burned. I had Mr. Seery make an estimate under my direction.

The witness Richard H. Rutledge testified:

> To a certain extent I am familiar with the burned district testified to by Mr. Skeels. I was on the scene of the "loop fire" or the Kelly Creek fire soon after it started. I know where the fire originated.
>
> The contractors started those fires. I am able to state that the contractors started the fires from the fact that they were using fire in their burning at those places right along, practically continuously, and that there was no other visible source for the fire. I was able to trace the fire by its course from the right of way to the points where it spread.

The witness Henry F. Kottkey gave testimony as follows:

> Practically all the fires but one I had in that dis-

trict, which was a good many, could have been traced, for I have seen a good many of them started from the right of way of the Chicago, Milwaukee & St. Paul Railway Company, ever since they started the construction work. All those fires originated from the brush burning or from sparks from the locomotives which fell into the brush. In 1907 there were at least six or seven fires that originated on the right of way. All those fires I have spoken of originated on the right of way.

There was one fire at the camp of G. O. Foss & Co., where a man had been washing his clothes and left a fire burning; that was one fire that did not originate on the right of way. It went over the right of way and burned timber on each side.

I can recall where the first fire was in 1907. It was Kennedy & Frazier's work at the mouth of Turkey Creek. When that fire started I was patrolling the lower end of the right of way down to the wagon road and a man came on horseback to notify me that there was a fire that got away from a man that was working there at Kennedy & Frazier's. When I got down there it had burned over about five or ten acres. You could trace this fire; fire leaves a track. I didn't see it start.

Kennedy & Frazier were contractors working on the road for the Chicago, Milwaukee & St. Paul.

The next fire that I recall in 1907 was from Charlie Johnson, contractor. That was east of the south of Kelly Creek. When it started I was, I guess, about three or four miles from the place where the fire started. I had been there that forenoon and seen the man burning the right of way and, of course, I draw my conclusions that when the fire got away it started from there.

The witness Otto F. Hanson testified:

I saw one fire. It originated about 300 yards from where I was living; it kept me fighting fire for a while. That fire started about 200 yards west of Tunnel 30 on the right of way. It burned over about forty acres. Most of that area was covered with small timber. It went all the way from pretty near brush up to six or eight inches. It was lodgepole, yellow pine and fir, all mixed.

The witness Daniel F. Seery testified:

I made an estimate of the timber that was standing on the burned district near the right of way. I commenced on what was known as the "loop fire" and worked in connection with the men appointed by the railroad company.

By the indication on the ground I could see that the fire started close to the steel bridge they were constructing across Kelly Creek. The fire ran north and to the west side of Section 7 north up Kelly Creek and extended into Section 6, same township and range, across over in easterly direction, Section 5, same township and range, into Section 8, to the west side of Section 8, crossing over in a northeasterly direction into Section 9, close to the Richmond mine and east to the Monitor mine, in Section 8, back in a southwesterly direction to the "loop" in Section 8. This map I hold before me contains a correct description of the burned area as described by me and the approximate acreage. Mr. Baker and I did make an estimate of the amount of timber that was burned over on each subdivision, and that amount is correctly stated on that map.

I noted the amount of seedlings that were burned.

I talked the matter over with Mr. Baker and Mr. Long; they did not assume the responsibility for the fire but they did for the timber that was destroyed, and eventually assumed the responsibility for the fire.

The witness identified Exhibit 35 introduced in evidence to show the acreage burned over and the kinds and quantities of the timber burned, for which the Government seeks to recover damages in this case.

NOTE.—The defendant objected to the introduction of any testimony relative to fires for the reason that whatever damages resulted from fires would have to be recovered in an action at law; that a court of equity was without jurisdiction to pass upon such matter and that it was incompetent under the issues in this case. It was asked that this objection should be considered as going to all of the testimony in regard to fires. Such ob-

jection was further assigned in the specification of objections to the admission of evidence (see Assignment 14, Rec., 105), but no direct ruling with respect thereto was made by the District Court, which court, however, considered and based in part its ruling upon such testimony and its action in this regard was affirmed by the United States Circuit Court of Appeals.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in disregarding such objection and admitting and considering the testimony objected to.

(9th Assignment of Error, Rec., 602-3-4-5-6-7.)

(d) The said District Court erred in refusing to sustain the defendant's objection, based upon the ground that it was a self-serving statement, incompetent and not properly verified, to Plaintiff's Exhibit No. 35 which is a tabulated statement showing the legal subdivisions of land, the acreage, kinds and quantities of timber therein, burned, with respect to which the plaintiff claimed and was awarded damages. The testimony with respect thereto is substantially as follows:

> This paper you hand me is my report, the amount of timber of the various kinds. That report was made October 12, 1908. I compiled this report every night; I took it first upon a note book and afterwards when I went in at night I wrote it in ink here. That comprises the legal subdivisions by forties of all the fires from the "loop" down to Arnold's Camp—the territory covered by the four maps. No one assisted me in the preparation of this report, but Mr. Baker had an exact copy of it. We compared it and checked it over. When they were finished, I did deliver a copy of this report to Mr. Day.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting this exhibit.

(10th Assignment of Error, Rec., 607-8.)

(e) The said District Court erred in failing to sustain the defendant's objection to the following question asked of the witness Seery:

"What was the amount of damage agreed upon between you and Mr. Baker and Mr. Long?"

This question was objected to upon the ground that Mr. Baker and Mr. Long were not shown to have authority to make any agreement in that behalf. The witness Seery, notwithstanding the objection, gave the following answer to said question:

"At $4 per thousand $16.182.80. The amount of seedlings was 1344¼. mixed seedlings at $10 per acre. I put that arbitrarily and I found since that it would cost more than that to reseed that area."

The said Circuit Court of Appeals erred in affirming the action of the said District Court with respect to said objection.

(11th Assignment of Error, Rec., 608-9.)

(f) The said District Court erred in failing to sustain the defendant's objection upon the same grounds to the following question asked of the witness Seery:

"What was the total amount agreed between you and Mr. Long?"

To which the witness answered:

"$29,627.20."

The said Circuit Court of Appeals erred in sustaining the action of the said District Court with reference to said objection.

(12th Assignment of Error, Rec., 609.)

(g) The said District Court erred in failing to sustain the defendant's objection to the admission in evidence of the Plaintiff's Exhibit "1A" offered in evidence in connection with the testimony of the witness Rockwell. The exhibit was objected to, in so far as it purported to show values, upon the ground that they were based upon an incorrect method of arriving at the value of the tim-

ber destroyed and upon the further ground that the qualification of the witness to testify as to values had not been shown.

Exhibit "1A" is a tabulated statement on four sheets showing in columns descriptions of area to which the figures refer, the subdivisions of sections, the condition of young trees, the age of immature timber on the areas burned and a variety of matters on which the witness based theoretical estimates of the values which young trees would have after reaching maturity, estimating the age of 100 years to be maturity of that class of timber.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibit.

(13th Assignment of Error, Rec., 609-10.)

(h) The said District Court erred in failing to sustain the defendant's objection to the introduction of Plaintiff's Exhibit "2A," the ground of objection being, as stated, that so far as showing quantities of timber in burned areas, it was a duplicate of Plaintiff's Exhibit "1A"; that in so far as it purported to show the cost of restocking and the value of the timber arrived at in that manner, it was immaterial, irrelevant and incompetent, the method not being a proper one to get at the market value of young timber, and upon the further ground that the qualifications of the witness to testify as to the cost had not been established.

Exhibit "2A" consists of three sheets, attached together, containing tabulated statements compiled for the purpose of showing what it would cost to restock the areas of immature timber burned and to care for such timber until it had arrived at the age at which it was estimated the burned timber had arrived.

The said Circuit Court of Appeals erred in affirming

the action of the District Court with respect to the admission and consideration of said exhibit.

(14th Assignment of Error, Rec., 610.)

(i) The said District Court erred in failing to sustain the defendant's objection to the admission of Plaintiff's Exhibit "3A," the grounds of said objection being the same as those interposed to the admission of the Plaintiff's Exhibit "1A." Said exhibit consists of two sheets attached together containing tabulated statements of the same nature and import as Plaintiff's Exhibit "1A."

(15th Assignment of Error, Rec., 610-11.)

(j) The said District Court erred in failing to sustain the defendant's objection to the admissibility of the Plaintiff's Exhibit "4A," the grounds of said objection being the same as those interposed to the admission of Plaintiff's Exhibit "2A," and the further ground of objection to the admissibility of all of said exhibits being specified, namely: That they are not competent under the issues of this case, the remedy for such injury, if any, being at law and a court of equity having no jurisdiction.

Plaintiff's Exhibit "4A" consists of two sheets containing tabulated statements of the same nature and import as Plaintiff's Exhibit "2A."

The said Circuit Court of Appeals erred in affirming the action of the said District Court with respect to the admission and consideration of said Exhibit "4A."

(16th Assignment of Error, Rec., 611.)

(k) The said District Court erred in failing to grant defendant's motion to strike out all of the testimony of the witness Rockwell for the reasons assigned and the various objections interposed, and for the further reason that it appears that in his estimates of the cost he allowed an unwarrantable rate of interest based on the

estimated value of the timber at maturity, and that there was no definite allowance for insurance or the probability that the timber would have been destroyed from other causes, and upon the further ground that the testimony was not competent, as furnishing any basis for equitable relief.

The substance of the testimony of said witness is as follows:

> As a forest officer I made an examination of burned areas along the right of way of the Chicago, Milwaukee & St. Paul Railway Company in the Coeur d'Alene National Forest in Idaho during the summer and fall of 1909. I had for my guidance in making that examination, maps, and have those maps with me. Daniel F. Seery identified this map as a copy of one used by him in his examination of this same area. This map shows the area that was burned over by the fire extending along the Milwaukee right of way. I located the area burned on the ground and compared the area with the map. The burned area, located in T. 46 N., R. 7 E., extended over land aggregating 1,016 acres in Sections 5, 6, 7, 8, 9, 17 and 18. That covers all the areas in this particular burn. I first made a casual examination to see the extent of the burn and what damage the fire had done and then made a study of the timber in the vicinity and what species were growing in that locality, what the rate of growth was and how much timber an acre of land would produce. I selected areas in the adjoining green timber which were growing under exactly the same conditions as were found on the fire areas, and carefully surveyed the plots. Then I measured the timber on each area. I calipered the trees, breast high, to find out how many trees there were of each diameter and of each species, and after having determined this, I selected average trees of the various diameters and cut these down; measured the diameters of the logs to determine the board feet contained, and in every case determined the age of the trees. From the volume of the average trees I determined the total volume per acre. I determined that the age at which the stand became merchantable was one hundred years. At the average age of one hun-

dred years, the average diameter of the white pine was a little over twelve inches and red fir and larch slightly larger than that. I determined that the area was seventy-five per cent. fully stocked and I had found from my examination of adjoining areas that fully stocked stands of that same kind of timber at one hundred years produced a certain amount of timber which would have a corresponding value at the stumpage rate of $4 per thousand. This would be the value of that young growth at maturity. The stand, however, was destroyed at fifteen years of age, so for eighty-five years the Government would be required to care for that area to protect it. To ascertain the value of the present stand at fifteen years of age, I subtracted the cost of caring for the stand for eighty-five years from the value which could have been received for the timber at maturity—the amount per year per acre which would have been necessary to expend in the care of that area if it had not been destroyed by fire would have been three cents per acre. After determining what the value of the timber would be at maturity minus the cost of caring for the timber for the remaining time which the timber would have to stand in order to mature, the amount thus obtained was discounted to the present time by compound interest tables at three per cent. There were ten acres of immature timber ninety years of age, thirty per cent. white pine, fifty per cent. Douglas fir, fifteen per cent. white fir, and five per cent. western larch. I determined that it has a value of $576.35. I considered that the most practicable means which might be used in restoring this legal subdivision to its condition before the fire to be planting. The cost would be $15 per acre for replanting the stand with the same kind of young trees as were there before the fire. Taking the eight acres upon which the stand had an average of fifteen years, the total cost would be $143.76 for replanting that area with the species that had been destroyed and caring for the growth until it reached the age at which it was destroyed, and on the area of ten acres on which the average was ninety years, the total cost to the Government of replanting that area and caring for it until it reached the age of ninety years would be $1,129. Since part of this timber has been

merchantable, however, the value of the merchantable part, $400, was subtracted from the total to get the value of the young growth alone, or $739. In the preparation of these sheets, Exhibits 1A, 2A, 3A and 4A, I used the method first described.

The said Circuit Court of Appeals erred in affirming the action of the said District Court with respect to such motion and in considering the said testimony.

(17th Assignment of Error, Rec., 611-615.)

(l) The said District Court erred in failing to sustain the defendant's objections to the testimony of the witness William W. Morris.

It was admitted, subject to the same objections interposed to Mr. Rockwell's testimony, that Mr. Morris would, if examined at length, testify to the same facts already covered in Mr. Rockwell's testimony relating to the examination of the sample areas described and the computation of the quantities of timber found upon these sample areas, as well as the ages of the trees and their diameters.

The said Circuit Court of Appeals erred in affirming the action of said District Court with respect to said testimony and in considering the same.

(18th Assignment of Error, Rec., 615.)

(m) The said District Court erred in failing to sustain the defendant's motion to strike the testimony of the witness F. A. Silcox as to the cost of fire protection. Said motion was made upon the ground that the testimony was incompetent, immaterial and irrelevant under the issues in this case. The substance of the testimony of said witness is as follows:

That in the district which includes the Coeur d'Alene National Forest, in connection with its timber sale work and fire protection, the Government is spending for all work about $742,000,000 which makes, on 29,000,000 acres approximately 2½ cents per acre. For administration and timber sales it

would be approximately one cent an acre and about one-half a cent an acre for fire protection proper. I figured that for three cents an acre we could put a man on fire patrol who can take care of the timber sale work on the present basis with a reasonable increase in sales and, in addition, provide one man for fire patrol to every thirty acres, depending on the fire danger. Of course, fire danger cannot be entirely eliminated, but it will be reduced to a minimum, so much that we feel it will be fairly safe. On a basis of one man for one-half township, he would be within approximately three miles of any fire started.

The said Circuit Court of Appeals erred in affirming the action of said District Court with respect to said testimony and in considering the same.

(19th Assignment of Error, Rec., 615-16.)

(n) The said District Court erred in finding that the plaintiff was entitled to recover from the defendant the sum of $12,000 on account of mature timber burned, and in including said amount in the sum for the recovery of which a decree was entered.

The said Circuit Court of Appeals erred in affirming the finding and decree of the said District Court with respect to the said sum of $12,000 on account of mature timber burned.

(20th Assignment of Error, Rec., 616-17.)

(o) The said District Court erred in finding that the plaintiff was entitled to recover the sum of $24,000 for immature timber burned, and including such amount in the total sum for which it entered a decree in favor of the said plaintiff.

The said Circuit Court of Appeals erred in affirming the finding and decree of the said District Court with respect to the said sum of $24,000 for immature timber destroyed by fire.

(21st Assignment of Error, Rec., 617.)

IV.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE FOR THE RECOVERY OF DAMAGES FOR TIMBER DESTROYED BY CUTTING.

Under this assignment, we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

(a) The said Circuit Court erred in overruling the following demurrer to a portion of the bill of complaint herein, namely:

> "To so much of said bill as charges that the said defendant has cut and caused to be cut upon the said strip of land one hundred feet in width on each side of the center line of defendant's right of way, and prays relief with respect thereto; for that it appears from the face of said bill that the said defendant had full right and authority to so cut and cause to be cut, and remove and cause to be removed, said timber; and for the further reason that there is no equity in said matters, or any thereof."

Said demurrer being set forth in the fourth paragraph of the demurrer filed herein.

The said Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court upon said demurrer.

(22nd Assignment of Errors, Rec., 617-18.)

(b) The said Circuit Court erred in overruling the defendant's demurrer to a portion of said bill, said demurrer being as follows, to wit:

> "To so much of said bill as charges that the said defendant has cut and removed, and caused to be cut and removed, a large amount of timber upon an additional strip of land upon the uphill side of said right of way, and upon land adjacent to said strips; for that it appears from the face of said bill that there is no equity in said matters, or in any thereof."

Said demurrer being set forth in the 5th paragraph of the demurrer filed herein.

The said Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court with respect to said demurrer.

(23rd Assignment of Error, Rec., 618.)

(c) The said Circuit Court erred in overruling the following demurrer to a portion of said bill, namely:

> "To so much of said bill as charges that the said defendant has cleared, and caused to be cleared, and is clearing and causing to be cleared, portions of said lands for the purpose of constructing a railroad, and has constructed and caused to be constructed and is constructing and causing to be constructed, a railroad; and has conducted and is so conducting its operations that it has destroyed and caused to be destroyed and is destroying and causing to be destroyed, large amounts of small timber and young growth upon the land theretofore described in said bill, through unskilled methods of lumbering; for the reason that it appears upon the face of said bill that there is no equity in said matters."

Said demurrer being set forth in the sixth paragraph of the demurrer filed herein.

The said Circuit Court of Appeals erred in affirming the ruling of the said Circuit Court with respect to said demurrer.

(24th Assignment of Error, Rec., 618-19.)

(d) The said District Court erred in failing to sustain the defendant's objection to all testimony concerning timber cut and the value thereof, which objection was interposed upon the ground that there was no equity in such matters and that such evidence was incompetent and immaterial under the issues in this case, which objection was understood to apply to the testimony of all the plaintiff's witnesses upon these matters.

The substance of the testimony to which this assignment relates was given by different witnesses called in behalf of the plaintiff to the effect that along the defendant's right of way crossing specific subdivisions of land

owned by the Government timber was cut and consumed by the defendant in the construction of its railroad; that other merchantable timber was cut for the purpose of clearing the right of way and was destroyed; that other timber was cut on land adjacent to the right of way, partly in compliance with requirements of the officers and agents of the United States Forestry Service for clearing the ground, and partly for use in the construction of the railroad. The witness Skeels further testified that he made examination of such lands for the purpose of determining the quantities of timber so cut, had made notes of his examinations, measurements and estimates to determine the amount of acreage, the quantity of timber of different kinds so cut and destroyed, and he and other witnesses testified as to the values thereof. Mr. Skeels further testified that from his examination and memorandum Exhibits 2 to 33 and Exhibit 34 were made up, all of which exhibits are attached to the evidence which was submitted to the trial court.

The said District Court made no rulings on defendant's objections, either sustaining or overruling the same, although the defendant in due time filed written specifications of the particular matters and items of evidence objected to which called for specific rulings as to said matters, but the said District Court, as is apparent from the opinion filed and the decree entered, considered such testimony.

The said Circuit Court of Appeals erred in sustaining the action of the said District Court with respect to said objection and in considering the testimony so objected to.

(25th Assignment of Error, Rec., 619-20.)

(e) The said District Court erred in failing to sustain the defendant's objection to the testimony of the witness Dorr Skeels as to the quantity of timber cut and timber values, which objection was based upon the following

grounds, to wit: (a) That under the issues of this case such questions were irrelevant and immaterial; that under the pleadings no questions of quantities of timber were involved; and (b) that under the admissions in the pleadings and in the stipulation, the defendant had the right to take all the timber on the 200-feet right of way and all other timber adjacent to the right of way which it needed for construction purposes.

The testimony of the witness, Mr. Skeels, so objected to, was in substance as follows:

> That he was Forest Officer on the Coeur d'Alene Forest Reserve, acting as assistant to the supervisor, Mr. Rutledge, in the spring of 1907; that in that spring the Milwaukee Railway started actual construction work upon its railway through the Forest Reserve; that he cruised first, the right of way, 200 feet in width; that he had made a report of this work, but did not have such report with him; that the railway company finally cleared the right of way over 200 feet in width, and that he had with him a report of a cruise which he made of the right of way as finally cleared; that in some places it was cleared over 200 feet in width on each side of the center line, and that it would vary 250 feet in places; that the extra clearing was done because, in the construction of the railway by the Milwaukee Company in Montana through the Helena Forest Reserve, the Forestry officers required them to clear a strip 200 feet in width on the upper side of the center line depending somewhat on the topography, and that it was agreed that if the railway company was allowed to proceed with the construction of the railroad through the Coeur d'Alene National Forest it would do the work in the same way; that the railway company's representative, Mr. Day, stated to the witness repeatedly that the company desired to comply with the usual regulations required by the Forest Service when railroads were building through national forests; that the witness had the estimates he made of the timber cut over the right of way as finally agreed upon and it was, as stated, irregular in width; that the estimates showed the amount of timber cut on the forty-

acre subdivision and the number of acres which they cut over in each forty acres, beginning at the Montana line in Section 26, Township 47 North, Range 6 E., P. M.; that at the close of each day he worked up his notes and entered the data on the map; that the report which he had before him was in nearly every case made at the close of the day when the estimate was made; that sometimes he might go two or three days before working up the data on the maps in his report; that it would depend a good deal on the way the work went; that he began to work about June, 1908, and finished it near the close of September, 1908."

The witness then testified, refreshing his memory from the memorandum before him, as to the quantity of timber on two forty-acre tracts, and, without further identification, Exhibits 2 to 33, inclusive, being the memoranda prepared by the witness as to the estimates of the timber cut, were read into the record and received in evidence, subject to the objections of the defendant. The witness then stated that he had a report which he made to the forester of the Forestry Service, stating the amount of timber which was cut by the railway company on its right of way and on the strip along the right of way in building the road through Coeur d'Alene National Forest; that it was a compilation of Exhibits 2 to 33, inclusive. This compilation was then offered and received in evidence over the defendant's objection as to its competency and marked Plaintiff's Exhibit 34. The witness then testified as to the market value of the timber.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in failing to sustain the defendant's objection to the testimony of the said witness Skeels, in considering said testimony, and in affirming the decree of said District Court.

(26th Assignment of Error, Rec., 620-623.)

(f) The said District Court erred in failing to sus-

tain the defendant's objections to the admission in evidence of Plaintiff's Exhibits 2 to 33, inclusive, on the ground that the documents which the witness was asked to read into the record were not his original memoranda, but compilations prepared by him from his original memoranda and therefore not admissible as books of original entry, and that not being admissible evidence, they could not be gotten into the record by having the witness read them into the record; that being inadmissible in themselves they could not properly be used by the witness or read into the record under guise of refreshing his memory and because the purpose of the testimony was to get the inadmissible documents themselves before the court.

The exhibits referred to consist of tabulated statements giving the quantity of feet of each kind of timber cut upon each Government subdivision. The testimony showing that these exhibits were not original memoranda, but compilations subsequently prepared by the witness is set forth in the statement of the substance of the witness' testimony under the last preceding assignment of error and is not therefore here repeated.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibits and in thus considering said exhibits in its affirmance of the decree of said District Court.

(27th Assignment of Error, Rec., 623-24.)

(g) The said District Court erred in failing to sustain defendant's objection to the admission in evidence of Exhibit 34, for the reason that the same was incompetent was not an original memorandum, but was a compilation prepared by the witness Dorr Skeels at times subsequent to the time for obtaining information from original sources.

Exhibit 34 is a document too voluminous to be quoted. The manner in which it was prepared has been heretofore stated in giving the substance of the testimony of the witness Skeels in Assignment of Error No. 26.

The said Circuit Court of Appeals erred in affirming the action of the said District Court in admitting and considering said exhibit and in thus considering said exhibit in its affirmance of the decree of said District Court.

(28th Assignment of Error, Rec., 624-25.)

(h) The said District Court erred in finding that the plaintiff was entitled to recover from the defendant the sum of $26,989 for timber cut upon the right of way and contiguous lands and in including such sum in the total amount which it decreed the plaintiff should have and recover of and from the said defendant.

The said Circuit Court of Appeals erred in affirming the finding of the said District Court to the effect that the plaintiff was entitled to recover from the said defendant said sum of $26,989 for timber cut, and in including said sum in the total amount which it was decreed the plaintiff should recover of the said defendant.

(29th Assignment of Error, Rec., 625.)

V.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT APPELLEE WAS NOT ENTITLED TO EQUITABLE RELIEF.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

(a) The said Circuit Court of Appeals erred in failing to hold that the following demurrer, duly interposed to the bill of complaint, should have been sustained, viz:

"To the said bill for that the same is without

equity and does not set forth any matters entitling said complainant to any relief from this court."

(31st Assignment of Error, Rec., 626.)

(b) The said Circuit Court of Appeals erred in failing to hold that the so-called "Peck Agreement" (set forth in the Bill) was invalid.

(32nd Assignment of Error, Rec., 626-27.)

(c) The said Circuit Court of Appeals erred in failing to hold that such agreement, if valid, was one which a court of equity would not specifically enforce.

(33rd Assignment of Error, Rec., 627.)

VI.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO HOLD THE BILL MULTIFARIOUS.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

The said Circuit Court of Appeals erred in failing to hold that the following demurrer interposed to the filing of the complaint herein, should have been sustained:

> "To said bill for that the same is multifarious in this: That the said complainant has joined in said bill matters for which the said complainant has a plain, speedy and adequate remedy at law with matters of equitable cognizance, the said matters being separate and distinct; that the said complainant has joined in said bill a cause of action arising out of an obstruction of a highway of the State of Idaho, and with which the said complainant has nothing to do, with a cause of action for damages arising out of alleged negligent acts of said defendant in setting out fires and thereby burning and destroying timber, together with an alleged cause of action for wilful waste and continuous trespass."

(30th Assignment of Error, Rec., 625-26.)

VII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO HOLD THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO AWARD TO APPELLEE ANY MONEY DAMAGES WHATSOEVER.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal:

The said Circuit Court of Appeals erred in failing to hold that the said Circuit Court and its successor the said District Court, were without jurisdiction in this action to award to the complainant damages for the following matters, to wit:

(a) For timber cut or removed from the right of way or contiguous land.

(b) For timber burned.

(c) For immature timber destroyed.

(d) For injuries sustained by rock and other debris thrown into the St. Joe River, or its tributaries; and in denying unto the said defendant the right to a trial by jury upon said several matters.

(37th Assignment of Error, Rec., 629.)

VIII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE DECREE ENTERED HEREIN WAS INCONSISTENT WITH ANY RIGHT OF RECOVERY BY APPELLEE, FOR TIMBER CUT FROM THE RIGHT OF WAY OR FOR MATERIAL OF EARTH, STONE AND TIMBER TAKEN FOR CONSTRUCTION PURPOSES FROM LANDS ADJACENT TO THE RIGHT OF WAY SUBSEQUENT TO MAY 10, 1907.

Under this assignment we shall consider the following of the errors specified in the Assignment of Errors and Prayer for Reversal.

The decree entered herein, having provided that the maps filed by the defendant should be deemed filed and approved as of May 10, 1907, the United States Circuit Court of Appeals erred in failing to hold that as to all timber cut from the right of way, and as to all material of earth, stone and timber taken for construction purposes from lands adjacent to said right of way subsequent to said date of May 10, 1907, the complainant was not entitled to any compensation whatsoever.

(52nd Assignment of Error, Rec., 638-9.)

ARGUMENT.

Point I.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT APPELLANT IS ENTITLED TO THE RIGHT OF WAY THROUGH THE FOREST RESERVE UNDER THE ACT OF MARCH 3RD, 1875, AND TO TAKE MATERIAL OF EARTH, STONE AND TIMBER FROM ADJACENT LANDS FOR CONSTRUCTION PURPOSES WITHOUT PAYMENT THEREFOR.

Appellant contends that it was, at the times mentioned in the bill, vested with legal title to the right of way (two hundred feet in width) upon which its road was constructed, together with the right to take from lands adjacent to such right of way, material of earth, stone and timber for construction purposes. These rights are asserted under the provisions of the Act of March 3rd, 1875. The facts, showing compliance by appellant with the conditions of this act, are stipulated and are set forth in the "Statement of Facts" at the beginning of this brief.

No question is made as to the sufficiency of these acts to entitle appellant to the benefits of the Act of March 3rd, 1875, if the lands within the Forest Reserve were subject to the provisions of that act. The sole conten-

tion is, that the lands involved were excluded from the operation of the Act of March 3rd, 1875, by the following orders, viz.: (a) The order of March 21st, 1905, made by the Commissioner of the General Land Office, by which he "*temporarily*" withdrew from sale and disposal these lands "pending a decision of the President as to the advisability of creating a National Forest thereof." (Bill, Rec., 6; Answer, Rec., 60-1; Stipulation, Par. 3; Rec., 183-184); (b) The proclamation of the President of November 6th, 1906, creating the Coeur d'Alene Forest Reserve. (Stipulation, Par. 8; Rec., 196-198.) And the effect of these orders upon the acquisition of rights by appellant under the Act of 1875, is the only question under this point, in determining which, careful consideration of the provisions of the Acts of March 3rd, 1875 (18 Stat., 482), and March 3rd, 1899 (30 Stat., 1219, 1233), supplemental thereto, is essential.

ACT OF MARCH 3RD, 1875.

This act is as follows, omitting immaterial parts:

"Section 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, sidetracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Section 3. That the Legislature of the proper ter-

ritory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned.

Section 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

Section 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed."

The act has been before this court in a number of cases, and certain legal propositions with respect thereto have been settled.

(a) *The grants made by this act are grants in praesenti of lands to be identified at some future period.*

Although the act is general, and contains neither the name of a grantee nor a description of the lands granted, it is, nevertheless, settled, that the grants thereby made are present grants as distinguished from grants *in futuro* or a mere promise to make grants.

> "The uniform construction of this act has been, that it is a grant '*in praesenti*' of lands to be thereafter identified."
>
> *Stalker* v. *O. S. L. R. Co.*, 225 U. S., 142, 146.
>
> *Noble* v. *Union River Logging R. Co.*, 147 U. S., 165, 176.
>
> *Jamestown & N. R. Co.* v. *Jones*, 177 U. S., 125, 130.

Minnesota, etc., Ry. Co. v. *Doughty,* 208 U. S., 251, 258.

What is meant by a grant *in praesenti* of lands to be thereafter identified, is placed beyond question by repeated decisions of this court:

> "It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in praesenti.* * * * They vest a present title * * * although a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed."

L. L. & G. R. Co. v. *U. S.,* 92 U. S., 733, 741.

M. K. & T. Ry. Co. v. *K. P. Ry. Co.,* 97 U. S., 491, 496.

St. P. & P. R. Co. v. *N. P. R. R. Co.,* 139 U. S., 1, 5.

This definition of grants *in praesenti* of lands to be hereafter identified, has been so often reiterated by this court that further citation of authority would be idle. While the three cases above cited relate to grants of lands to aid in the construction of roads, as distinguished from right of way grants, the same rule of construction is uniformly applied to grants of the latter class.

R. R. Co. v. *Baldwin,* 103 U. S., 426, 429-30.

Ry. Co. v. *Alling,* 99 U. S., 463, 475.

Bybee v. *O. & C. R. Co.,* 139 U. S., 663, 679-80.

M. K. & T. Ry. Co. v. *Cook,* 163 U. S., 491, 497.

N. P. Ry. Co. v. *Ely,* 197 U. S., 1, 5.

N. P. Ry. Co. v. *Hasse,* 197 U. S., 9, 10.

Stuart v. *U. P. R. Co.,* 227 U. S., 342, 353-4.

(b) *A railway company becomes a grantee under the Act of* 1875 *when, being qualified, it accepts the provisions of the act and identifies itself as such grantee by filing with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same.*

In *Dakota Cent. R. R. Co.* v. *Downey,* 8 L. D., 115, 117, Secretary Vilas, speaking with reference to this act, said:

> "It will be noticed that there is one point of difference between the present grant of this act and those where a single grantee, as a state or a railroad company, is named. In this grant, not only is the land indefinite in location, and therefore a float —in the language sometimes employed with respect to grants of land to aid in the construction of railroads or otherwise—but the particular corporation is indefinite and uncertain. In order, then, to make this grant attach, it is necessary to provide a fixity of grantee, as well as fixity of location upon the ground.
>
> To determine what company shall be considered as a grantee or beneficiary under this act, the first section provides simply that it shall be 'any railroad company organized under the laws of any state or territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same.' *Immediately, therefore, upon the filing of these two documents, the company stands in the attitude of being named in the act, as entitled to its benefits, so far as the grantee is concerned— I think no farther; and that thereafter its relation is the same as that of the state; or the particular railroad company, to which, by similar acts grants of lands have been made for such purpose.*" (The italics are ours.)

See, also:

Montana Ry. Co., 21 L. D., 250.

St. P. M. & M. Ry. Co. v. *Maloney,* 24 L. D., 460, 461.

Kootenai Valley R. R., 28 L. D., 439, 440, *et seq.*

In *Jamestown & N. R. Co.* v. *Jones*, 177 U. S., 125, 130, this court sustained the foregoing construction of the statute by Mr. Vilas, as proper and in harmony with the decision in *Noble* v. *R. R. Co.*, 147 U. S., 165, saying:

> "This case (*Noble* v. *R. R. Co.*, 147 U. S., 165), establishes that a railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of its organization under the same with the Secretary of the Interior. It was also so held by Mr. Secretary Vilas in *Dakota Central R. R. Co.* v. *Downey*, 8 Land Decisions, 115."

See, also:

> *Minneapolis, etc., Ry. Co.* v. *Doughty*, 208 U. S., 251, 258.

> "By the authorities and decisions on the subject, it is conceded that, as soon as any corporation referred to in the first section of said act, files with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization, such corporation becomes a grantee just as specifically and as definitely as if the name of the corporation were entered in the act itself."

> *O. S. L. R. Co.* v. *Stalker*, 14 Idaho, 362; 94 Pac. Rep., 56, 62; Affd., 225 U. S., 142.

(c) *A railway company, when identified as a grantee under the Act of* 1875, *is immediately vested with the right and authority to proceed with the construction of its road, and, for such purpose, to enter upon the desired right of way and to take from public lands adjacent thereto material of earth, stone and timber necessary for construction.*

While this has not been specifically ruled by this court, it is a necessary consequence of the construction, now settled, that a grantee under the Act of March 3, 1875, may locate and identify the right of way granted, by construction as well as by filing a map of location.

> *Jamestown & N. R. Co.* v. *Jones*, 177 U. S., 125, 130-132.

> *Barlow* v. *N. P. Ry. Co.*, 240 U. S., 484, 487-8.

The right to fix location by construction, necessarily implies the right to construct, and as construction involves not only occupation of the right of way but the taking of material, it follows that these rights are vested in a grantee who has become identified as such, prior to the filing or approval of maps of location. Any other conclusion involves the absurdity of holding that while the act contemplates fixing the location by construction, it prohibits construction until after the location is fixed. This conclusion is recognized in the decisions of the Department of the Interior:

> "Where, as in the matter under consideration, the question is one solely between the United States and the company claiming the benefits of the provisions of the act, all that is necessary in order to entitle the company to the right to take, from the public lands adjacent to the line of its proposed road, material, earth, stone and timber, necessary for the construction thereof, is the filing of its articles of incorporation and due proofs of organization, as provided for in the first section of the act; for, if the full privileges of the grant made by the act can be secured by the construction of the road without the previous filing of the map of location, * * * the right to take stone and timber must exist before construction, for the use to be made of the material, earth, stone and timber is limited to the construction of the road."
>
> *Kootenai Valley R. R.*, 28 L. D., 439, 441-2.
>
> *De Weese* v. *Henry Investment Co.*, 39 L. D., 27, 32-33.

Disregarding for the present, for reasons hereafter given, the temporary withdrawal of March 21st, 1905, the application of the above propositions to the facts here, determines that *appellant's grant under the Act of March 3rd, 1875, is prior in time to the creation of the Coeur d'Alene National Forest.* Appellant became identified as a grantee under the Act of 1875, February 17th, 1906, when the certified copy of its articles of in-

corporation and proofs of its organization were accepted and filed. The proclamation creating the Forest Reserve, was November 6th, 1906, or over eight months later. Whether, under the Act of March 3rd, 1875, the grants of rights of way, when identified, relate back to the date of the granting act, taking effect as of that date, or whether such grants when identified, relate back only to the date when the company became identified as a grantee under the act, has never been decided by the courts, nor is it necessary that it be decided in the present case. Whichever date be the correct one, the grant to appellant antedates the creation of the Forest Reserve.

Construing the grants *in praesenti* of rights of way to be thereafter identified, made by various special acts of Congress, this court has repeatedly held that, in the absence of reservations or exceptions contained in the granting act, the title of the grantee to the right of way, when identified, relates back to, and takes effect, as of the date of the granting act, and, being prior in time, is prior in right, to all claims, rights or reservations initiated or created subsequent to the date of the granting act.

R. R. Co. v. *Baldwin,* 103 U. S., 426, 429-30.
Bybee v. *O. & C. R. R. Co.,* 139 U. S., 663, 679-80.
Stuart v. *U. P. R. R. Co.,* 227 U. S., 342, 353-4.

That this construction is applicable to the Act of March 3rd, 1875, and that the title of the grantee to the right of way, when identified, relates back to, and takes effect as of, a date at least as early as that of the identification of the grantee, cutting off all subsequent claims, rights or reservations, *not excepted by the terms of the act,* cannot be doubted. Unless, therefore, the exceptions to be found in the Act of 1875 are sufficiently broad to

include the Forest Reserve and to permit the Executive Department, to cut off and extinguish the rights which appellant had acquired in the lands involved by identification of itself as a grantee, the acts of appellant, in occupying and appropriating the right of way for two hundred feet in width and in taking from adjacent lands of the United States material of earth, stone and timber, for construction purposes, were not unlawful and afford no basis for a claim for compensation.

THE EXCEPTIONS IN THE ACT OF 1875.

The only provisions excepting lands from the operation of the Act of 1875, are embodied in the following clauses of that act:

(a) Section one grants the right of way in terms "through the public lands of the United States."

(b) Section three authorizes the condemnation of "possessory claims on the public lands of the United States."

(c) Section five provides:

> "That this act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed."

(a) *The term "public lands," as used in right of way grants, including those made by the Act of* 1875, *is not used in a sense exclusive of lands withdrawn or reserved.*

It was contended by appellee in the lower courts that the lands involved were not public lands after the withdrawal of March 21st, 1905, or after the President's proclamation, because such term is habitually used to indicate only such lands belonging to the United States as are subject to sale or other disposition under the general laws, and that as the grant made by Section 1 of

the Act of 1875, is of right of way through only "the public lands of the United States," it did not embrace these lands. While this court held, in *Wilcox* v. *Jackson*, 13 Peters, 498, and in subsequent decisions, that the term "public lands" has been habitually used as descriptive of lands of the United States subject to sale or other disposal under general laws, this is not a statutory definition of the term and these words have been repeatedly used in a broader sense.

U. S. v. *Blendaur* (C. C. A.), 128 Fed. Rep., 910, 913.

U. P. Ry. Co. v. *Karges*, 169 Fed. Rep., 459, 462.

Kindred v. *U. P. Ry. Co.* (C. C. A.), 168 Fed. Rep., 648, 652; Affd., 225 U. S., 582, 596.

U. P. Ry. Co. v. *Douglas County*, 31 Fed. Rep., 540.

U. S. v. *Minnedoka S. R. Co.* (C. C. A.), 190 Fed. Rep., 491, 494.

An examination of Congressional legislation granting rights of way through the public lands, shows that *for more than twenty years immediately preceding the passage of the Act of March* 3, 1875, *Congress had never used the term "public lands" in these grants in a sense other than as inclusive of lands in withdrawals and reservations.*

By act approved August 26th, 1852 (10 Stat., 35) Congress provided:

> "That there be, and is hereby, granted to said state, the right of locating a canal through the public lands, known as the Military Reservation of the Falls at St. Maries River, in said state; and that four hundred feet of land in width extending along the line of such canal be, and the same is hereby, granted * * * for the construction and convenience of such canal."

By act approved February 8, 1859 (11 Stat., 381) Congress provided:

> "That the right of way through, and the privi-

lege of constructing depots and workshops on, the public lands of the United States lying in the County of St. Clair, State of Michigan, commonly called the Fort Gratiot Military Reservation, be, and the same is hereby, granted to any railroad company. * * * And provided further, that all the buildings to be erected upon said reservation shall be of wood, and if, at any time, it should be deemed expedient by the commanding officer of Fort Gratiot, or by any other higher military authority, to destroy such buildings by fire or otherwise, no claims shall be made against the United States for damages."

By act approved June 10th, 1852 (10 Stat., 8), Congress provided:

"Section 1.—* * * That the right of way *through the public lands* be, and the same is hereby, granted to the State of Missouri, for the construction of railroads, * * * with the right also to take necessary materials of earth, stone and timber for the construction thereof, from the public lands of the United States adjacent to said railroads. * * *

Section 2.—* * * That there be, and is hereby, granted to the State of Missouri, for the purpose of aiding in making the railroads aforesaid, every alternate section of land designated by even numbers for six sections in width on each side of said road; * * * *And provided further,* that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, *except so far as it may be found necessary to locate the route of said railroads through such reserved lands; in which case the right of way only shall be granted.*"

This proviso makes it clear that the right of way grant made by Section 1 included "reserved lands," but as the only right of way granted by Section 1 was, in terms, "through the public lands" only, the term "public

lands'' in this right of way grant was necessarily used in a sense broad enough to include the reserved lands.

From this time, every grant to a state to aid in the construction of railroads contained these, or similar, provisions with respect to the right of way over reserved lands.

Act	approved	February 9, 1853 (10 Stat., 155).
"	"	June 29, 1854 (10 Stat., 302).
"	"	May 15, 1856 (11 Stat., 9).
"	"	May 17, 1856 (11 Stat., 15).
"	"	June 3, 1856 (11 Stat., 17).
"	"	June 3, 1856 (11 Stat., 20).
"	"	August 11, 1856 (11 Stat., 30).
"	"	March 3, 1857 (11 Stat., 195).
"	"	March 3, 1863 (12 Stat., 772).
"	"	March 3, 1863 (12 Stat., 797).
"	"	May 5, 1864 (13 Stat., 64).
"	"	May 5, 1864 (13 Stat., 66).
"	"	May 12, 1864 (13 Stat., 72).
"	"	June 20, 1864 (13 Stat., 140).
"	"	June 25, 1864 (13 Stat., 183).
"	"	July 2, 1864 (13 Stat., 355).
"	"	July 4, 1866 (14 Stat., 83).
"	"	July 4, 1866 (14 Stat., 86).
"	"	July 4, 1866 (14 Stat., 87).
"	"	July 5, 1866 (14 Stat., 89).
"	"	July 23, 1866 (14 Stat., 210).
"	"	July 25, 1866 (14 Stat., 236).
"	"	July 26, 1866 (14 Stat., 289).
"	"	February 25, 1867 (14 Stat., 409).
"	"	March 3, 1869 (15 Stat., 340).

In addition to the acts granting lands to states to aid in the construction of railways, above cited, in each of which Congress made it clear that the right of way grant "through the public lands'' was intended to include a right of way through "reserved lands," Congress, between 1862 and 1871, made a number of grants direct to railway companies for the purpose of aiding in the construction of their proposed railroads.

Act approved July 1, 1862 (12 Stat., 489).
" " July 2, 1864 (13 Stat., 365).
" " July 27, 1866 (14 Stat., 292).
" " July 13, 1866 (14 Stat., 94).
" " July 25, 1866 (14 Stat., 239).
" " March 2, 1867 (14 Stat., 548).
" " March 3, 1871 (16 Stat., 573).

The first of these made to aid in the construction of the Union Pacific, by act approved July 1st, 1862, was the model upon which the remainder of these direct grants were framed. Their phraseology differs somewhat from that employed in the grants to the states first referred to, and the policy of making the right of way grant applicable to reserved lands was not as clearly expressed as in the acts making the grants to the states. There was nothing, however, to indicate that the term "public lands," as used in the sections granting rights of way, was used in a different or narrower sense than in the contemporaneous and similar grants to states; and the whole policy embodied in these Pacific railroads grants was inconsistent with, and prohibits, an interpretation of the right of way grants which would make the latter less liberal or effective than the right of way grants embodied in the acts granting lands to states to aid in the construction of railroads. The provisions of the Pacific railroads grants evinced throughout a disposition to be far more generous than in the grants to states to aid in what were considered local roads. The rights of way granted were wider; they included, not only right of way but station grounds, which were not given in grants to states. The quantities of lands granted to aid in the construction of the Pacific railroads, were, in most cases, double those conferred in state grants. To the Union Pacific there was granted, in addition, direct financial aid in the form of United States bonds. This policy of greater generosity in connection with these roads is so

inconsistent with the idea that burdens were placed upon them in the acquisition of rights of way, from which the local roads were free, that only the clearest declaration of such purpose would justify the conclusion that the term "public lands" in these right of way grants was used in a narrower and more restricted sense than in the grants to states.

In addition to the foregoing grants of right of way and lands, Congress, between 1869 and March 3, 1875, made a number of right of way grants to railway companies, unaccompanied by land grants.

Act of March 3, 1869 (15 Stat., 325).
" " December 15, 1870 (16 Stat., 395).
" " April 12, 1872 (17 Stat., 52).
" " June 1, 1872 (17 Stat., 202).
" " June 1, 1872 (17 Stat., 212).
" " June 4, 1872 (17 Stat., 224).
" " June 7, 1872 (17 Stat., 280).
" " June 8, 1872 (17 Stat., 339).
" " June 8, 1872 (17 Stat., 340).
" " June 8, 1872 (17 Stat., 343).
" " March 3, 1873 (17 Stat., 612).
" " June 23, 1874 (18 Stat., 274).
" " February 5, 1875 (18 Stat., 306).
" " March 3, 1875 (18 Stat., 509).

The granting terms in these acts were substantially like the grants of rights of way in the various Pacific railroads acts; and in two thereof, Congress made it clear that the term "public lands," as used therein, included reserved lands.

The Act approved June 7, 1872 (17 Stat., 280), provided:

> "Section 1. That there is hereby granted to the Jacksonville & St. Augustine Railway Company * * * a right of way through the public lands of the United States * * * for 100 feet in width on each side of the track of said railway company * * * with the right to take from said lands, or from any of the public lands adjacent thereto, stone, timber, earth or other material to be used in the

> construction and repair of said railroad; and said company shall also have the right to enter upon any of the public lands, or lots of lands, the property of the United States, and take the same for depots, shops, sidetracks, or necessary uses of said railroad; provided, that no lot or tract of land so taken shall exceed forty acres in one place. *No military reservation shall be crossed or appropriated unless the consent of the Secretary of War be first obtained, and then only under such restrictions as he shall establish.*"

The Act approved June 23, 1874 (18 Stat., 274), provided:

> "That the right of way through the public lands be, and the same is hereby, granted to the Arkansas Valley Railway Company, * * *. Said right of way is granted to said railway company to the extent of one hundred feet * * * *where it may pass through the public domain and military reservation at Fort Lyon,* including grounds for station buildings." * * *

Congress having made it clear in the acts granting lands to states and in these Acts of June 7th, 1872, and of July 23rd, 1874, that the grants of rights of way "through the public lands of the United States" were operative upon reserved lands—in other words, that the term "public lands," as used in the right of way acts, was not used in a sense exclusive of reservations—and there being nothing in the other acts indicative of a purpose when granting rights of way to use the term "public lands" in a narrower sense, it must be presumed that this term was used with the same meaning in all of these right of way grants.

> "The same clause, relating to the same subject, and enacted in pursuance of the same policy, did not have one meaning in one grant and a different meaning in another."
>
> *U. S.* v. *Morrison*, 240 U. S., 192, 205.

That these right of way grants were operative upon

reserved lands, notwithstanding that the grants were, in terms, of rights of way "through the public lands" only, has been the construction placed thereon by the courts.

M. K. & T. R. Co. v. *Roberts,* 152 U. S., 114.

M. K. & T. Ry. Co. v. *Watson,* 74 Kan., 494; 87 Pac. Rep., 687, 689.

Coleman v. *St. P. M. & M. Ry. Co.,* 38 Minn., 260; 36 N. W. Rep., 638, 639.

U. P. Ry. Co. v. *Douglas County,* 31 Fed. Rep., 540.

Kindred v. *U. P. Ry. Co.* (C. C. A.), 168 Fed. Rep., 648; Affd. 225 U. S., 582.

U. P. Ry. Co. v. *Karges,* 169 Fed. Rep., 459.

U. S. v. *D. & R. G. Co.,* 190 Fed. Rep, 825, 845-7.

See, also:

U. S. v. *Minnedoka & S. W. R. Co.* (C. C. A.), 190 Fed. Rep., 491, 494-5.

Riverside Township v. *Newton,* 11 S. D., 120; 75 N. W. Rep., 899.

Peterson v. *Baker,* 39 Wash., 275; 81 Pac. Rep., 681.

This review of right of way legislation establishes that Congress had, since 1852, uniformly used the term "public lands" in right of way grants, as inclusive of lands reserved or withdrawn, and the existence of a public policy that such grants should be operative over and across reserved lands. And when, in Section 1 of the Act of March 3, 1875, Congress used the familiar form of grant, namely, "that the right of way through the public lands is hereby granted," it must be presumed, in the absence of words indicating a contrary intention, that the term "public lands," was there used in the same sense in which Congress had uniformly used it during more than twenty years in making the cognate grants, viz: as inclusive of reserved and withdrawn lands.

2 Lewis' Sutherland's Statutory Construction (2nd Ed.), Sec. 1072; id., Secs. 443, 447.

And that Congress did use the term "public lands" in Section 1 as inclusive of all lands subject to the power of disposition by Congress, including lands reserved or withdrawn, is clearly shown by the provisions of Sections 3 and 5 of the act.

Section 3, by expressly authorizing the condemnation of possessory claims on public lands, clearly implies that the interest of the United States is granted, subject only to the obligation of the grantee to make compensation to the private claimant for his interests taken; while the express exclusion, by Section 5, of lands within the limits of any military, park or Indian reservation, clearly indicates the Congressional understanding that the grant, notwithstanding it was of a right of way through public lands, only, would have been operative through such reservations but for this exception.

> "It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted, —that which the words of the grant could not comprehend."
>
> *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191.
>
> *Commonwealth* v. *Summerville*, 204 Pa., 300; 54 Atl. Rep., 27, 29.
>
> Lewis' Sutherlands' Statutory Construction (2nd Ed.), Sec. 351.

(b) *Possessory claims on the public lands.*

Section 3, authorizing the condemnation of "possessory claims on the public lands of the United States," by implication excludes from the grant such possessory claims. As noted above, however, this exception is rather of the private interest of the claimant than of the lands which belong to the United States and over which the right of way is apparently granted subject to the obligation to condemn the interest of the private claimant.

(The practice in the Department is to receive maps where *unpatented* land is affected, and to approve them subjecting to "existing valid claims."

Regulations, May 21, 1909 (37 L. D., 787), Pars. 18, 4.)

As no question of possessory claims arises here, this exception does not require consideration. It is sufficient to note that it is, in principle, like the exception of preemption, homestead and other claims initiated prior to the filing of a map of definite location, found in all of the grants of land to aid in the construction of railways. It is not inconsistent with the doctrine that the grant is one *in praesenti* or that the title to right of way, when identified, relates back to a date at least as early as the time when the grantee became identified by filing its articles of incorporation and proofs of organization, although in a number of cases this clause led federal circuit and state supreme courts to erroneously hold the grant not to be one *in praesenti*. The judgments of these courts were correct, because, by virtue of this implied exception, possessory claims initiated prior to the identification of the right of way, were protected as against the floating grant, but the reason assigned, namely, that the grant was not one *in praesenti*, was erroneous. We may note as examples of such decisions the following:

S. F. & N. Ry. Co. v. *Ziegler* (C. C. A.), 61 Fed. Rep., 392.

R. R. Co. v. *Sture*, 32 Minn., 95; 20 N. W. Rep., 229.

D. & R. G. R. Co. v. *Wilson*, 28 Col., 6; 62 Pac. Rep., 843, 845.

(c) *The withdrawal or reservation for the Forest Reserve did not operate to bring the lands within the provisions of Section* 5 *of the act, providing that it should not "apply to any lands within the limits of any military, park or Indian reservation, or other lands especially reserved from sale."*

1. *Section 5 does not exclude from the application of the act, all reservations or reserved lands.*

Congress having, in 1841, provided for the acquisition of pre-emption rights in public lands, excluded from the operation of that law certain lands, as follows:

> "The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of pre-emption, to wit:
> *First.* Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose * * *." (Revised Statutes, Sec. 2258.)

The Homestead Act of 1862, by limiting its application to those lands which were "subject to pre-emption," made the same exception. (Rev. Stat., Sec. 2289.)

The Act of June 10, 1852 (10 Stat., 8), granting lands to the State of Missouri to aid in the construction of railroads, excepted from the lands granted reserved lands, by the following provision:

> "And provided further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act. * * *"

And this formula, descriptive of the lands excepted from the operation of the grant because reserved, was followed without material variation in all of the land grant acts passed prior to 1862.

Act approved February 9, 1853 (10 Stat., 155).
" " June 29, 1854 (10 Stat., 302).
" " May 15, 1856 (11 Stat., 9).
" " May 17, 1856 (11 Stat., 15).
" " June 3, 1856 (11 Stat., 17).
" " June 3, 1856 (11 Stat., 18).
" " June 3, 1856 (11 Stat., 20).
" " June 3, 1856 (11 Stat., 21).
" " August 11, 1856 (11 Stat., 30).
" " March 3, 1857 (11 Stat., 195).

In the Union Pacific Act of July 1, 1862 (12 Stat., 489), Congress adopted the following formula for the purpose of excluding reserved lands, namely:

> "That there be, and is hereby, granted to the said company, * * * every alternate section of public lands, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said railroad * * * not sold, reserved, or otherwise dis- at the time the line of said road is definitely fixed." posed of by the United States, and to which a pre- emption or homestead claim may not have attached,

And this formula, with immaterial variations, was used in all grants of land thereafter made direct to railway companies to aid in the construction of railroads.

Act	approved	July 2, 1864 (13 Stat., 365).
"	"	July 27, 1866 (14 Stat., 292).
"	"	July 13, 1866 (14 Stat., 94).
"	"	July 25, 1866 (14 Stat., 239).
"	"	March 2, 1867 (14 Stat., 548).
"	"	March 3, 1871 (16 Stat., 573).

After the passage of the Union Pacific Act of July 1, 1862, the formula used in the grants of lands to states to aid in the construction of railroads, was modified so as to include, in addition to the formula used in the acts preceding the Act of July 1, 1862, a formula substantially identical with that used in the grants to railway companies direct. Thus in the first act approved March 3, 1863 (12 Stat., 772), Congress provided:

> "That there be, and is hereby, granted to the State of Kansas, * * * every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, *or that the same has been reserved by the United States for any purpose whatever, then* it shall be the duty of the Secretary of the Interior to cause to be selected * * * so much

land, * * * as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid. * * * *And provided further, that any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act,* * *."

This formula, with immaterial variations, was followed in most of the aid grants to states made thereafter.

Act approved May 5, 1864 (13 Stat., 64).
" " May 5, 1864 (13 Stat., 66).
" " May 12, 1864 (13 Stat., 72).
" " June 20, 1864 (13 Stat., 140).
" " June 25, 1864 (13 Stat., 183).
" " July 4, 1866 (14 Stat., 83).
" " July 4, 1866 (14 Stat., 87).
" " July 23, 1866 (14 Stat., 210).
" " July 25, 1866 (14 Stat., 236).
" " July 26, 1866 (14 Stat., 289).

In a few acts making aid grants, passed subsequent to March 3, 1863, however, the formula in use prior to the passage of the Union Pacific Act of 1862, was in substance followed.

Act approved March 3, 1863 (12 Stat., 797).
" " July 2, 1864 (13 Stat., 355).
" " July 4, 1866 (14 Stat., 86).
" " July 5, 1866 (14 Stat., 89).
" " Feby. 25, 1867 (14 Stat., 409).
" " March 3, 1869 (15 Stat., 340).

It thus appears that Congress, in excepting lands from the grants made in aid of these internal improvements, (1st) followed closely fixed formulae in expressing its intent, and (2nd) that the formulae, thus uniformly used, expressed the purpose to exclude *all* reserved lands in clear, unmistakable language. This policy of excepting all reserved lands from the land grants was in sharp

contrast with what was, as we have seen, an equally fixed policy of not excepting reserved lands from right of way grants.

In the Act of March 3, 1875, Congress departed from the familiar phraseology used in the land grant acts, and which clearly expressed a purpose to except all reserved lands, and substituted in lieu thereof a phraseology new in land grant and right of way legislation, viz:

> "That this act shall not apply to any lands within the limits of any military, park or Indian reservation, or other lands especially reserved from sale * * *"

The phraseology thus adopted was not well adapted to the expression of a purpose to exclude all reserved lands from the application of the act. The specific enumeration of three special classes of reservations, viz., military, park or Indian, was, in itself, an indication of a purpose to limit the exclusion, and while the express enumeration of the three classes of reservations was followed by the general clause, "or other lands especially reserved from sale," it must be presumed that Congress was familiar with the rule of construction uniformly applied to acts of this character:

> "When there are general words following particular and specific words, the former must be confined to things of the same kind." Lewis' Sutherland's Stat. Const., 2nd Ed., Sec. 422.

And it must be further presumed that Congress knew, and therefore intended, that the reservations which would be excluded from the application of the act by Section 5, would be restricted by the phraseology employed to military, park or Indian reservations and those of the same character, viz., such as naval reservations, national cemeteries, etc.

The conclusion that it was not the purpose by this language to exclude all reservations, is further supported by the use of the word "especially" as a term modify-

ing and limiting the word "reserved" in the general clause. It was not all reserved lands which were excluded from the operation of the act, but those lands, and those only, which should fall within the description "*especially* reserved," as used in the general clause which itself followed terms of specific enumeration. We further note as giving added significance to the use of this modifying term, that, so far as we have been able to discover, this is the only time that Congress ever used such a limiting expression.

Keeping in mind the uniform policy of Congress, which had obtained for more than twenty years, of not excluding reservations from the operation of right of way grants, and the settled practice of using fixed formulae to express the purpose to exclude reserved lands from the lands granted in aid of works of this nature, which formulae, in clear, definite and well understood terms, excluded *all* such reserved lands, the conclusion is irresistible that when, in the Act of 1875 granting rights of way, Congress adopted a phraseology which not only departed from these familiar formulae but which would not, under well known canons of construction, be construed as including *all* reservations, its intention was that all reservations were not to be excluded from the application of this act.

It is true that the Act of 1875 departed from the long continued public policy of granting rights of way without exception of lands reserved, to the extent that this act excluded from its operation certain reservations. The reason for this departure, however, is clear, and is consistent with a limitation of the excluded reservations. Prior to 1875 all right of way grants had been special, and Congress was in a position to inform itself, in each case, as to what reserves would be traversed by the rights of way, and to protect, by special exclusion, any public

interests requiring such action. The Act of 1875, however, was a general act under which rights of way would be acquired without opportunity for Congress to ascertain or know what particular reserves would be crossed, and the power to protect the public interests by special exclusion adapted to the exigencies of the individual case, was thus lost. It was with this thought in mind that Congress, in the general act, for the first time, excluded from the rights of way granted, certain reservations. But, the purpose being only to protect the public interests, it did not attempt to exclude all reservations, but only those where the public interests might be detrimentally affected by railway intersection; and the act must be construed in harmony with the settled policy of granting rights of way over reservations where such grants were not distinctly detrimental to, or destructive of, the public interest.

2. *Temporary withdrawals and Forest Reserves are not similar in character to Military, Park or Indian Reservations.*

That Congress did not have in mind when passing the Act of March 3, 1875, forest reservations, or reservations of such character or for such purpose, is certain, since such reservations were then unknown, and no authority to create such reservations existed prior to the passage of the Act of March 3, 1891 (26 Stat., 1095), when the forest reservation legislation was initiated. And to justify a ruling that such reservations are within the class which it was the congressional purpose to exclude from the operations of the Act of 1875, it must appear that they are in their character closely analogous to those reserves which Congress had in mind and distinctly specified. Military, park and Indian reservations are created for inhabitancy, or for usage with which the presence of a public railway would, in nearly every case,

be incompatible. In the case of a military reservation, or of a park, like Yellowstone, created to preserve natural beauties, the wild animals, and to serve as a public playground such incompatibility, is at once perceptible. Clear objections to the extension of railways through Indian reservations existed in the well known jealousy of these people in the preservation for themselves of the lands set apart for their use. The construction, maintenance and operation of a railway through such reserves, would be destructive of the tribal isolation which the policy in creating Indian reservations was designed to maintain. It would render difficult, if not impossible, the enforcement of police regulations such as those prohibiting the sale of liquor to Indians, and it would bring about a close contact between the white people and the Indians which history had shown to be the fruitful mother of Indian wars. Forest reserves were for totally different purposes. The Act of March 3, 1891 (26 Stat., 1095), provided that the President might set apart and reserve "public lands wholly or in part covered with timber or undergrowth" as public reservations. The Act of June 4, 1897 (30 Stat., 11, 35), provided that no public forest reservation should be established "except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." The purpose was not inhabitancy, but the conservation of timber and of water flows and to this end to create a wilderness. The construction of a railway through such wilderness for the purpose of connecting the settled communities on the opposite sides thereof, is not destructive of the reservation or inconsistent with its maintenance and continued use for the purposes for which it was created. Such construction is not detri-

mental to, but in furtherance of, the public interests. The forests are therefore not of the character of reservations which Congress excluded from the operations of the Act of 1875. They are within neither the letter nor the spirit of Section five of that act.

3. *An interpretation of the Forest Reserves Act as authorizing the creation of Reservations which would be excluded from the grants made by the Act of March 3, 1875, is in conflict with the declared policy of the United States.*

The Act of March 3, 1891 (26 Stat., 1095; 7 Fed. Stats. Ann., 310), initiating the system of creating forest reserves by executive proclamation, is as follows:

> "That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

As in 1891 the public lands wholly or in part covered with timber or undergrowth, were largely confined to the mountain ranges west of the Mississippi River, namely, the Rocky Mountains and ranges to the westward thereof, for the most part parallel with the Rocky Mountains, Congress must have anticipated that, under this act, vast areas of land extending far to the north and south along these mountain ranges, covering passes as well as peaks, would be reserved—an anticipation abundantly realized. And if Congress intended that these reservations should, or understood that they would, bring the reserved lands within the operation of Section 5 of the Act of March 3, 1875, thereby excluding the construction of railways across the same, it must be presumed that Congress understood that this legislation would, and therefore in-

tended that it should, authorize the creation of barriers to the construction of railways necessarily crossing these districts and, particularly, to the construction of transcontinental railways to the Pacific Coast. This is a necessary conclusion from the fact that no provision was made in the Act of March, 1891, for the acquisition of railway rights of way across the forest reserves. This omission was not due to oversight or neglect. The attention of Congress was directed to the probable effect of these reservations upon works of internal improvement and to the necessity of providing for rights of way therefor, within the limits of the forests. Sections 18 and 19 of the act provided:

> "Section 18. That the right of way through the public lands *and reservations* of the United States is hereby granted to *any canal or ditch company* formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch; provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.
>
> Section 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and

if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way."

The close conformity of these provisions to the language of Sections one and four of the Act of March 3, 1875, makes it certain that Congress had the railway right of way act before it and in mind in drafting this Act of 1891.

A presumption that Congress intended, by the Forest Reserve Act, to authorize the creation of artificial barriers to the construction of railways necessarily crossing the districts which it was well known would be reserved, is in conflict with the public policy of encouraging the construction of transportation lines, which the United States had steadily pursued for nearly seventy years prior to 1891 and which it thereafter continued to pursue. The policy of aiding in the construction of transportation lines by the granting of rights of way therefor, began at least as early as 1823. In that year and continuing until 1852, rights of way over the public domain for such transportation lines had been repeatedly granted.

Act approved February 28, 1823 (3 Stat., 727).
" " May 26, 1824 (4 Stat., 47).
" " March 2, 1831 (4 Stat., 474).
" " March 3, 1835 (4 Stat., 778).
" " July 2, 1836 (5 Stat., 65).
" " March 3, 1837 (5 Stat., 196).
" " January 31, 1837 (5 Stat., 144).
" " June 28, 1838 (5 Stat., 253).
" " March 3, 1849 (9 Stat., 771).
" " March 3, 1849 (9 Stat., 772).
" " Sept. 20, 1850 (9 Stat., 466).

Between the passage of the Act of 1850, above cited, and the passage of the general right of way Act of 1875, nearly fifty additional acts, which we have already cited, were passed granting such rights of way. The general right of way Act of 1875 was thus but the culmination of a long series of special acts. It did not mark the beginning of a narrower policy or indicate any purpose to abandon the long-continued policy theretofore pursued. Instead, it indicated a purpose to continue the previous policy in an even more generous manner. The purpose of the act was to do away with the necessity of applying for special grants in individual cases by permitting *all* railway companies to secure rights of way over the public lands by compliance with a general law. And that the Act of 1891 did not mark a change in, or termination of, this policy, is made clear by the Act of March 2, 1899, where Congress made the following provisions for securing railway rights of way through Indian reservations, a class which had been excluded from the operation of the Act of 1875:

> "Section 1. That a right of way for a railway, telegraph and telephone line, through any Indian reservation in any state or territory, or through any lands held by an Indian tribe or nation in Indian territory, or through any lands reserved for an Indian Agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any state or territory, which shall comply with the provisions of this act and such rules and regulations as may be prescribed thereunder. * * * (30 Stat., 990; 3 Fed. Stats. Annot., 511-12.) See also Act approved March 3, 1909 (35 Stat., 781; Fed Stat. Annot., Supp. 1909, p. 239).

This policy had been particularly emphasized in con-

nection with the construction of railways connecting the Pacific Coast with the Mississippi Valley and the country to the eastward thereof. The transcontinental railways had been especial favorites. Aid to such lines had been given with more than royal munificence. This clearly declared policy, uniformly pursued through many years, cannot be ignored in construing legislation which impinges thereon. Every presumption is against an interpretation which would conflict therewith and which would permit the creation of insuperable barriers to such railway construction—barriers which Congress, in the light of existing conditions, must have foreseen would be created and would preclude the construction, above all, of the particularly favored transcontinental railways. If such legislation is reasonably susceptible of an interpretation harmonizing it with the declared public policy, that interpretation should be adopted in preference to one which would make it inconsistent with, and destructive of, that policy. That the Act of March 3, 1891, is susceptible of such construction cannot be doubted. We have seen that the Act of March 3, 1875, did not by its terms exclude all reserves. And if Congress did not understand or intend that the reservations authorized by the Act of 1891 should fall within the classes of reserves which were excluded from the provisions of the Act of 1875, then there is no inconsistency between the authority conferred upon the President to create these reservations and the policy of aiding in the construction of railways by the granting of rights of way therefor. Such, we submit, is the proper interpretation of these two acts.

That Congress did not intend the forest reserves to operate as a bar to works of internal improvement and did not consider the granting of rights of way, easements and privileges therein, inconsistent with the exist-

ence or maintenance of such reserves, is made manifest by its legislation. We have seen that in the very act authorizing the creation of such reserves, provision was made for the acquisition of rights of way for canals and reservoirs.

By Act approved May 14, 1896, Congress provided:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing or distributing electric power." (29 Stat., 120; 6 Fed. Stat. Ann., 510-511.)

By Act approved June 4, 1897, it further provided:

"Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." (30 Stat., 36; 7 Fed. Stats. Ann., 314.)

By Act approved May 11, 1898, it further provided:

"That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of Sections eighteen, nineteen, twenty and twenty-one of the act entitled, 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for

the development of power, and subsidiary to the main purpose of irrigation." (30 Stat., 404; 6 Fed. Stat. Ann., 512.)

By Act approved February 15, 1901, it further provided:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits, or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: * * *."

(31 Stat., 790; 6 Fed. Stats. Ann., 513.)

By Act approved March 4, 1911, it further provided:

"That the head of the department having jurisdiction over the lands, be, and he hereby is, authorized and empowered under general regulations to be fixed by him, to grant an easement for rights of way for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States, for electrical poles and lines for the transmission and distribution of elec-

trical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: * * *."

(36 Stat., 1235.)

It is true that rights of way and privileges granted or authorized by these acts, were made subject to the approval of the department having jurisdiction of the forests. None the less, this legislation demonstrates that it was not the policy of Congress to permit the forest reserves to operate as barriers to works of internal improvement; and, further, that Congress did not consider such rights of way or easements in themselves inconsistent with, or detrimental to, the continued existence or maintenance of the forests.

The improvements for which rights of way and privileges within the forest reserves were thus expressly provided, were local in their character. Their importance to the public was small as compared with the importance of securing the construction of railways, many of which, like that of appellant, would be interstate and transcontinental, serving a large part of the country. Is it conceivable that Congress would thus carefully provide for the protection of these local enterprises within forest reserves, and take no cognizance of those more important enterprises which had been the subject of its especial care for nearly seventy years? Yet if the view that the right of way Act of 1875 was not operative within these forest reserves, is sound, we are forced by this legislation to such conclusion. Any argument leading to such conclusion is inherently unsound. The only reasonable explanation of the silence of Congress upon the subject of railway rights of way across these re-

serves, while it was granting easements within their boundaries for local enterprises, is, that it understood that the reservations which it had authorized for forest purposes by the Act of 1891, were not of the same class as military, park or Indian reservations and were not therefore within the exception in Section 5 of the Act of 1875, and that railway right of way grants were applicable to the lands in such forest reservations.

(4) *Congressional interpretation of the Act of March 3, 1875, embodied in the Act of March 3, 1899.*

The conclusions reached, based upon the construction of the Acts of March 3, 1875, and of March 3, 1891, and subsequent legislation, namely, that forest reserves were not within the classes of reservations excluded from the operation of the Act of 1875, are confirmed by a provision of the Act of March 3, 1899. (30 Stat., 1233; 6 Fed. Stats. Ann., 513.)

This provision appears in an isolated sentence in a deficiencies appropriation act, and reads as follows:

> "That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when, in his judgment, the public interests will not be injuriously affected thereby."

(a) *The Act of 1899 neither granted rights of way or easements within forest reserves, nor authorized the Secretary of the Interior to make such grants.*

Grants by the United States are never presumed. While the doctrine of strict construction does not apply to general granting acts to the same degree that it does to special grants (*U. S.* v. *D. & R. G. R. Co.*, 150 U. S., 1, 14; *U. S.* v. *St. Anthony R. R. Co.*, 192 U. S., 524, 530 *et seq.*), nevertheless an act will not be construed as making a grant unless the intention so to do appears with reason-

able certainty. Doubts are resolved against the existence of the grant.

The Act of 1899 contains no words of grant, nor does it purport to confer upon the Secretary of the Interior any authority to make one. It authorizes the Secretary to file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site. There is no doubt or obscurity with respect to this authority. The doubt and obscurity arise when the attempt is made to infer from this provision that Congress intended, that as a consequence of the filing and approval of such surveys and plats, a grant of a right of way, easement or license should be made. No such purpose is declared in the act and no language is to be found therein which can, by any process of construction, be twisted into a declaration of such purpose. Nevertheless, the appellee, the District Court and the Court of Appeals, confronted with the problem of finding a purpose for this enactment after having held that the Act of 1875 was inoperative within these reservations, have read into this provision a grant of a right of way or easement, or authority in the Secretary of the Interior to make such grant. This construction, assuming, as it does, inability upon the part of Congress to express its purposes in definite terms, is unjustifiable. Congress had familiar formulae which it habitually used in expressing a purpose to make such grant or to confer such authority. We have heretofore cited numerous acts granting rights of way and covering the period extending from 1823 to 1875. In these acts the purpose of making the grant had been expressed in apt, certain and definite terms, namely: "there is hereby granted," or "there be and is hereby granted."

In the Act of March 3, 1891, *supra*, the grant of right

of way through public lands and reservations was made to canal and ditch companies by the familiar phraseology "the right of way * * * is hereby granted."

In the Act of May 14, 1896, *supra*, the authority to the Secretary of the Interior to permit the use of an easement over the public lands and in forest reserves for the purpose of generating, manufacturing or distributing electric power, was made in clear terms:

> "The Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground," etc.

Similar language is found in the Acts of Feb. 15, 1901, *supra*, and March 4, 1911, *supra*.

In the Act of March 2, 1899, *supra*, providing for the acquisition of rights of way by railway companies through Indian Reservations, the language is "that a right of way * * * through any Indian Reservation * * * is hereby granted." This act was under consideration by Congress at the same time that the Act of March 3, 1899, was receiving its attention. If the purpose of the Act of March 3, 1899, was to grant, or to authorize the granting of such right of way or easement, through forest reservations, the two enactments were closely akin, their purposes identical, save as to the class of reservation through which the right of way was to be given. And, if this were the case, is it not certain that Congress—a body very apt, in such laws, to follow precedent in phraseology—would have expressed that purpose in its familiar formula of words, or, at least, in terms equally clear, definite and certain? The rule that public grants are not presumed and the omission in this act of all terms of grant and of all provisions expressive of any purpose to make or authorize such grant, emphasized as it is by the complete departure from the

phraseology which had been habitually used for many years when it was the purpose to make or authorize such grants,—a phraseology again employed in the contemporaneous granting Act of March 2, 1899—prohibit a construction of the Act of March 3, 1899, as an act either making, or authorizing the making, of a grant.

Not only is the Act of March 3, 1899, wholly and utterly insufficient in itself to make or authorize a grant, but it is equally insufficient when considered as supplemental (as it undoubtedly is) to previous legislation. It was contended by appellee in the courts below and, we presume, will be here, that the Act of March 3, 1899, was a separate and distinct grant in itself, but that the words "in the form provided by existing law" had reference, so far as railway rights of way were concerned, to the Act of March 3, 1875, and, by such reference, imported into the Act of 1899 the provisions of Section 4 of the Act of 1875 providing for the identification of rights of way over surveyed lands by filing maps. The District Court found this construction untenable, saying (207 Fed., 170):

> "Let us suppose that the 'existing law' simply prescribed forms of procedure, and conferred no right; the provision in itself contains no words of grant, and upon what theory could it be contended that the Secretary's approval would operate to effect a grant or confer any right whatsoever? It would, therefore, seem that to render the enactment effective for any real purpose, it becomes necessary not only to import the forms and procedure, but also a measure, at least, of the potency and effect signified thereby in the system from which they are borrowed." (Rec., 147.)

So ruling, the District Court held that the Act of 1899 must be construed as supplemental to the Act of 1875, saying (207 Fed., 171):

> "That in the express adoption of the forms and procedure in that act prescribed, and the authoriza-

> tion of the Secretary of the Interior, at his discretion, to file and approve maps and surveys tendered in conformity therewith, there is necessarily implied the intent that such approval shall operate to consummate a right of way grant, such as would be effected by a like approval of similar plats and surveys upon public unreserved lands under the Act of 1875."

The court held, however, that the grant, which was thus implied, extended to a bare easement without the privilege of taking timber, stone or earth either from the right of way or from lands adjacent thereto.

The contention by appellee and the construction of the act by the District Court, not only imply a grant by the Act of March 3, 1899, for which no warrant is found in its language, but also ignore the language of the Act of March 3, 1875, from which act they seek to draw by reference the implied grant, or authority to grant, which they read into the Act of 1899.

Turning to Section 5 of the Act of March 3, 1875, it will be seen that the exclusion of the classes of reserved lands which Congress intended to exclude from the operations of that act, is made by a mandatory declaration "that this act *shall not apply* to any lands within the limits of any military, park or Indian Reservation," etc. The exclusion is not made merely by an exception of the reserved lands from the grants, but is made, in unusual phraseology, by a broad declaration that none of the provisions of the act shall have any application whatsoever to lands within the excluded reserves.

The effect of the construction so contended for and declared, is thus not only to imply a grant from an act containing no terms of grant, but also to make the Act of 1899, repeal in part the very provision relied upon to exclude these lands from the operation of the Act of 1875, although it contains no words of repeal.

Even less tenable is the construction by the Circuit Court of Appeals. That court, having held that the forest reserve lands were absolutely excluded from the operation of the Act of 1875 as reserved lands to which the provisions of that act were made nonapplicable by the terms of Section 5, held that the Act of 1899, by vesting the Secretary with authority to approve surveys and plats, when, in his judgment, the public interests would not be injuriously affected thereby, by implication vested him with authority to prescribe conditions for the protection of such interests, upon compliance with which he would approve such surveys and plats. (Rec., 581-2.) The court, however, failed utterly to find any act by which the grantee would acquire any rights in the reserve if its survey and plats *were* approved. *And if the forest reserves are, as held, reservations excluded from the operation of the Act of* 1875, *there was, and is, no law under which a railway company can secure a right of way within the limits of such reservations.*

There appears to have been some vague thought underlying the opinion of the Court of Appeals that, in some way, a right of occupancy of forest reserves by railway companies was authorized by the Act of June 4, 1897, since the court says (218 Fed., 298):

> "Now, referring to the authority expressly conferred upon the Secretary of the Interior by the Act of June 4, 1897, to make rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction, thus delegating to such department a broad scope of regulation touching forest reservations, it would indicate that, when the Act of 1899 was adopted, Congress assumed that the Secretary already had ample power and authority to regulate, by rule and the imposition of proper conditions, the occupation generally of forest reserves, and the special purpose of that act was to

> render the power specific as respects occupation for right of way for railroad purposes; hence, the peculiar wording of the act."

The suggestion that Congress assumed that the Secretary had ample power and authority to regulate, by rule and the imposition of proper conditions, the occupation generally of forest reserves—implies that Congress ignorantly assumed the existence of a power in the Secretary which had, in fact, no existence in law. It proceeds upon the basis that Congress was ignorant with respect to its own previous legislation and the rulings of the courts thereon. *This is true because there was no previous enactment authorizing any general occupancy of forest reserves.* That a construction which can have, as its only foundation, an assumption of ignorance of the law upon the part of the legislative body, is untenable, goes without saying.

> 2 Lewis' Sutherland's Statutory Construction (2nd Ed.), Secs. 355, 447.

Nor is there the slightest reason to infer from the provision in the Act of 1897, referred to by the Court of Appeals, that Congress had in mind any general occupancy of such reservation. The provision referred to by the court reads as follows:

> "The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations * * * and he may make such rules and regulations and establish such reserves as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *." (30 Stat., 35; 7 Fed. Stats. Ann., 312.)

By Sections 18 and 19 of the Act of March 3, 1891, *supra*, by which the system of creating forest reservations by executive proclamation was initiated, there was, as we have seen, a grant of right of way within forest re-

serves to canal and ditch companies. By the Act approved May 14, 1896, *supra,* Congress had authorized the Secretary of the Interior to permit the use of rights of way within forest reserves for the purposes of generating, manufacturing or distributing electric power. The Act of June 4, 1897, *supra,* itself provided for the occupancy and use of lands in forest reserves, as follows:

> "It is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.
>
> For the purpose of preserving the living and growing timber and promoting the young growth on forest reservations the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations, as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the state or territory in which such timber reservation may be situated, respectively, but not for export therefrom. * * *
>
> The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such business.
>
> Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes, and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor

shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, that such persons comply with the rules and regulations covering such forest reservations.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the state wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Any mineral lands in any forest reservation which have been, or which may be, shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained." (30 Stat., 34-36; 7 Fed. Stats. Ann., 312-315.)

Ample reason for the provision authorizing the Secretary to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction," is found in these provisions authorizing the use and occupancy of the forest reserves for the special purposes named, without implying from that clause any general power upon the part of the Secretary to permit the use and occupancy of the forest for every purpose, including the construction and operation of railways. The very enumeration of the purposes for which such use and occupancy was authorized—and which enumeration did

not include use and occupancy for railway purposes, a use and occupancy expressly excluded, according to the holding of the court, by Section 5 of the Act of 1875,—is conclusive that *these provisions* were not intended to authorize the Secretary to permit the use or occupancy of the forest or to grant a right of way therein for railway purposes; and the construction of the Act of 1899 by the Court of Appeals, which forced it to assume that Congress ignorantly supposed these provisions authorized the Secretary to permit the use of the forest reserves for railway purposes, is untenable.

We are not surprised that the District Court, in view of its construction of Section 5 of the Act of 1875, as excluding the forest reserves from the operations of that act, was led to declare, with respect to the Act of March 3, 1899, that "the language of this remarkable provision is truly cryptic in its obscurity" (207 Fed., 170), or that it put forward the construction which it finally adopted with evident doubt as to the correctness thereof. (Rec., 146-149.) Nor are we surprised that the Court of Appeals, in the light of its own construction, declared with respect to the Act of 1899 (218 Fed., 297): "It is somewhat obscure, and just what Congress intended to accomplish by its adoption is not readily apparent." (Rec., 581.)

As construed by the Court of Appeals, it was an enactment absolutely and utterly futile.

(b) *The Act of* 1899 *is supplemental to, and amendatory of, the Act of* 1875, *and is declaratory of the understanding and intention of Congress that forest reservations are not within the class of reserves excluded from the Act of* 1875 *by Section* 5 *thereof.*

But while the Act of 1899 is "cryptic" in its obscurity and without apparent purpose if the forest reserves are excluded from the operations of the Act of 1875 under

the provisions of Section 5 thereof, the difficulties in its construction at once disappear if Congress understood and intended that the Act of 1875 was operative within the limits of these reserves. Its purpose then becomes clear, and the language used apt and appropriate to the declaration of that purpose.

Section 4 of the Act of March 3, 1875 had provided:

> "That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, *if the same be upon surveyed lands*, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the Register of the Land Office of the District where such land is located, a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way."

Construing this section, the Interior Department held that it provided for approval of maps upon surveyed lands, but required no filing or approval of such maps prior to survey; that any regulation of the department requiring or providing for the filing of maps over unsurveyed lands, must be held to operate for purposes of information merely. (*Utah & Wyo. R. R. Co.*, 1 L. D., 397.)

This ruling was followed in the regulations for the acquisition of rights of way under the Act of 1875, issued November 4, 1898. Rule 17 provided:

> "Maps or plats of lines of route or station grounds, lying wholly on unsurveyed lands, may be received and placed on file in the General Land Office and the Local Land Office of the District in which the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to, nor approved by, the Secretary of the Interior, as the act makes no provi-

sion for the approval of any but maps showing the location in connection with the public surveys." (27 L. D., 663, 667.)

The context of the Act of March 3, 1899, requires that, so far as the railway rights of way were concerned, it should be read in connection with Section 4 of the Act of 1875. That is the only general act granting rights of way over public lands, and Section 4 contains the only provision for filing or approval of surveys and plats of location. And when, in the Act of 1899, Congress enacted that "in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a * * * railroad * * * over and across any forest reservation or reservoir site," it clearly referred to this provision of the Act of 1875.

Reading the provisions of the Act of March 3, 1899, into Section 4 of the Act of 1875, as we clearly must, it amends the section as it had theretofore been construed by the Interior Department, by clearly authorizing the acquisition of rights of way *across forest reserves,* in advance of construction, by the filing and approval of the plats, whether the lands were surveyed or unsurveyed, and it was then a well known fact that the greater part of the Forest Reserves were in *unsurveyed lands.* This purpose, one not in itself of much importance, further explains the parenthetical character of the enactment.

But as the provision for approval of maps of right of way surveys across forest reserves would be futile if there were no provision for the acquisition of railway rights of way therein, the enactment clearly embodies a declaration by Congress that there was existing law under which they could be acquired, and as the Act of 1875 was the only act under which, by any construction, it

could be held that such rights of way were authorized. the Act of 1899 amounted to a Congressional declaration that the reservations excluded from that act by the provisions of Section 5 thereof, did not embrace forest reserves. This Congressional declaration and construction conform to the long-continued policy of aiding in railway construction by the granting of rights of way. It explains the failure of Congress to provide for railway rights of way across forest reserves, a failure otherwise utterly unintelligible in view of the numerous acts granting rights of way in such reserves for canals, reservoirs, electric lines, ditches, flumes, etc., purely local in character and of far less public importance than railways. It is consistent with, and the only construction by which, the provisions of the Act of 1875, and those of the Act of March 3, 1899, can be harmonized. And this interpretation of the law, by the law-making body, made long prior to the acts charged in the bill, is controlling.

The Court of Appeals attempts to support its construction of Section 5 of the Act of 1875, making it include forest reserves, by reference to certain special acts of Congress passed for the purpose of granting rights of way to certain railway companies across forest reserves.

Act of May 28, 1896 (29 Stat., 190).
Act of June 6, 1896 (29 Stat., 253).
Act of May 18, 1898 (30 Stat., 418).
Act of July 8, 1898 (30 Stat., 729).
Act of Jan. 10, 1899 (30 Stat., 783).
Act of Feb. 28, 1899 (30 Stat., 910).

To the acts thus cited may be added that of June 27, 1898 (30 Stat., 493).

Referring to these enactments, the court says:

> "It must have been the view of Congress that, without these enabling acts, a railroad company had no right, under the Act of 1875, to cross forest reserves; otherwise, there was no need of their enactment." (Rec., 573-4.)

We submit that but little or no weight can be given to these enactments as a legislative interpretation of the Act of 1875. They were all private and special. Such laws are usually framed by the parties desiring them and are passed, upon a favorable committee report, with but little consideration by Congress itself. That body, upon receiving a bill with a favorable report—where the bill did not apparently injuriously affect public interests and where it was in harmony, as here, with the public policy—would not refuse to pass the act merely because the grantee could secure the privileges conferred by compliance with an existing general act. Such acts, therefore, represent the views of those seeking them or their desire to avoid difficulties in the Interior Department by an erroneous construction of the general law, rather than the views of Congress as to the proper interpretation of that law. That is made clear by the fact that these special acts were passed *subsequently*, as well as prior, to the passage of the Act of March 3, 1899.

See Act of Feb. 25, 1903 (32 Stat., 907), granting the Central Arizona Railway Company a right of way for railroad purposes through the San Francisco Mountains Forest Reserve.

(5) *The order of withdrawal of March 21st*, 1905.

We have not undertaken in the foregoing, to distinguish between the withdrawal of March 21st, 1905, and the forest reservation created by proclamation November 6th, 1906, after appellant had identified itself as a grantee under the Act of 1875. If the views thus expressed are sound, the existence of neither the withdrawal, nor the reserve, prevented the attachment of the grants made by the Act of 1875 to the right of way selected by appellant or furnished any grounds for requiring it to agree to the conditions embodied in the stipu-

lation which the decree compels it to sign. There is, however, a distinction between the withdrawal and the reserve; and, even if we should concede that the reservation when created was within the exceptions made by Section 5 of the Act of 1875, it by no means follows that the withdrawal would also operate to except the land from that grant.

(a) *The withdrawal did not create a reservation similar in character to a military, park or Indian reservation.*

The withdrawal was, by its terms, temporary in character:

> "I hereby *temporarily* withdraw from all disposal." (Rec., 184.)

It was only to remain in force, according to the admitted allegations of the bill, "pending a decision of the President as to the advisability of creating a national forest thereof." (Rec., 6.) The distinction between such a withdrawal and a reservation of the character specified in the Act of 1875, is manifest, and has been for many years recognized and applied by the Interior Department. Congress having authorized the selection of indemnity in lieu of school lands, where such lands "are mineral land, or are included within any Indian, military or other reservation," the Department held that a temporary withdrawal of lands, in contemplation of the creation of a forest reserve, did not entitle the grantee to indemnity. The Secretary of the Interior, rejecting the application for such indemnity, said:

> "These temporary withdrawals, made preliminary to the establishment of a forest reserve, are, from the nature of things, largely in excess of the land which may be finally set apart as a forest reservation, and examination thereof is made as fast as possible with the force available for the purpose. The withdrawal made October 14, 1902, your office letter reports, includes, approximately 100 town-

ships, or 2,304,000 acres. While lands so withdrawn are not subject to disposition under the general land laws, yet they are not within a 'reservation,' within the meaning of that term as employed in the Act of February 28, 1891, *supra;* nor are they within a 'reservation' within the meaning of the term as there employed until reserved by the proclamation finally establishing the forest reservation. The Act of 1891 provides indemnity where the school sections so granted 'are mineral land' and also are included within any Indian, military, or 'other reservation.' Indian and military reservations include lands specifically appropriated to a particular use, and the words 'other reservation,' as employed in the Act of 1891, must signify a reservation of like character to those specifically enumerated. Mere temporary or preliminary withdrawal of lands with a view to their investigation and examination to determine what part, if any, should be included within a forest reservation, cannot be construed as placing such lands within a reservation of like character to an Indian or military reservation."

State of Calif, 32 L. D., 346, 347.

And see:

Cora E. Whittaker, 33 L. D., 355.

L. C. Howell, 39 L. D., 92, 93.

(b) *The withdrawal was void because prohibited by law.*

In *United States* v. *Mid-West Oil Co.,* 236 U. S., 459, it was held that the Executive Department had power, without special authorization from Congress, to withdraw lands from the operation of the general land laws. This determination, however, was based upon the long-continued acquiescence by Congress in the exercise of such power, and nothing in the opinion suggests that such power does or can exist when its exercise has been expressly or impliedly prohibited. And a review of the enactments with respect to forest reserves, shows that temporary orders of withdrawal, made in anticipation

of the creation of a forest reserve by proclamation, are prohibited.

First. The Act of March 3, 1891 (26 Stat., 1095), authorizing the creation of forest reserves by order of the President of the United States, coupled with the grant of authority a direction as to the mode in which it should be exercised:

> "The President shall, by public proclamation, declare the establishment of such reservation and the limits thereof."

By the Act of June 4, 1897 (30 Stat., 35) Congress further limited, by express provision, the purposes for which a forest reserve could be created, as follows:

> "No public forest reservation can be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

These limitations prohibit the temporary withdrawal of lands pending a determination as to whether a forest reserve shall be created. The positive declaration against such creation except for the express purposes named, is inconsistent with a purpose to permit the executive officers, by official ukase, to withhold at will vast sections of the public domain from settlement and entry for another purpose, namely, to permit such officials to determine, at their leisure, as to whether they shall include such areas within a forest reserve to be thereafter created.

Second. The Act of 1897 (30 Stat., 36; 7 Fed. Stats. Ann., 314), provides:

> "That in cases in which a tract covered by an *unperfected bona fide claim*, or by a patent, is included within the limits of a public forest reservation, *the settler* or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land

> open to settlement not exceeding in area the tract covered by his claim or patent * * *."

This provision, recognizing and protecting settlement claims in existence at the date of the creation of the forest reserve by the President's proclamation, clearly indicates that it was the purpose of Congress that the lands should remain open to settlement and to the initiation of the rights thus protected, until the reserve was created. In this particular the act is identical in character with the railway land grants. Such grants uniformly provided for the protection of homestead settlements and pre-emption claims which had attached to the lands within the boundaries of the grants at the date the same were defined by the definite location of the line. And this court, construing these provisions, which are substantially identical in character with the indemnity provision in the Act of 1897, above quoted, has repeatedly held that by necessary implication, they prohibited executive withdrawals of the lands for the benefit of the railway companies prior to the time the definite location of the road was fixed.

> *Hewitt* v. *Schultz*, 180 U. S., 139, 144 *et seq.*
> *Nelson* v. *No. Pac. Ry. Co.*, 188 U. S., 108, 115 *et seq.*
> *Sjoli* v. *Dreschel*, 199 U. S., 564, 566.
> *No. Pac. R. R. Co.* v. *Sanders*, 166 U. S., 620, 636.

These cases arose under the Northern Pacific land grant, and as references are made in the opinions to the sixth section of that act, it might be inferred that the provisions in that section controlled the decisions.

Brandon v. *Ard*, 211 U. S., 11, 21, however, makes it clear that the rulings were not based upon provisions peculiar to the Northern Pacific Act, but upon the conclusion that inasmuch as the acts granted indemnity in lieu of lands sold or to which the right of pre-emption or home-

stead settlement had attached, or which had been reserved by the United States when the line of the road was definitely fixed, Congress intended that the lands should remain open to such disposition until that time, and that withdrawals of the lands in advance thereof were, by necessary implication, prohibited.

As the provisions in the railway land grant acts, thus construed, are, in principle, identical with the provision found in the Act of 1897 for the protection of settlement claims within forest reserves, the rule of construction adopted in the land grant cases must be applied here, and, pursuant thereto, it must be held that the Act of 1897, by necessary implication, prohibited withdrawals in advance of the creation of the reservation.

As, for the foregoing reasons, the withdrawal order was entirely without effect upon the acquisition of rights in and to the withdrawn lands under the Act of 1875, further consideration of such order is unnecessary.

The order of withdrawal being ineffective to prevent the acquisition of rights in the lands withdrawn under the Act of March 3, 1875, the Railway Company having identified itself as a grantee under that Act February 17th, 1906, by filing with the Secretary of the Interior a certified copy of its articles of incorporation and due proofs of its organization thereunder, and there being no exception in the Act of 1875 under which the subsequently created forest reserve could be permitted to cut off the rights to which the Railway Company had become entitled as such grantee, it follows that when the right of way was located and identified, whether by maps or by actual construction, the Railway Company took title thereto as of a date not later than February 17th, 1906. The title with which it was thus vested, was that granted by the Act of March 3, 1875, and included the timber and material thereon.

Rio Grande Ry. v. *Stringham,* 239 U. S., 44, 47.

There can, therefore, be no recovery by the United States for the timber cut upon the right of way.

Not only is the conclusion that the appellant was vested with the title to its right of way through this forest reserve under the Act of 1875, fatal to the claim of appellee for timber cut upon the right of way and for all damages claimed from acts lawfully performed in the construction of the railroad, but it is also, as we shall hereafter point out, fatal to the claim of appellee to any specific performance of the alleged agreement signed by Mr. Peck, since it is destructive of all consideration for that agreement.

(6) *The right of way was excepted from the Forest Reserve by the terms of the proclamation creating the same.*

Not only was the right of appellant to the right of way within the forest reserve prior to the creation of the reserve, and, therefore, preserved by operation of law as against the reservation, for the reasons hereinbefore set forth, but it was also excepted from the reservation by the very terms of the President's proclamation of November 6, 1906, creating the reserve which contained the following clause:

> "This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry or other appropriation, for any purpose other than forest uses, *or which may be covered by any prior valid claim, so long as the withdrawal reservation, or claim exists.*" (Rec., 197.)

We have seen that prior to the date of this proclamation, the appellant had identified itself as a grantee under the Act of March 3, 1875, by filing its articles of incorporation and due proofs of its organization thereunder. By its amended articles which were transmitted to, and received by, the Commissioner of the General Land Office, prior to the date of the proclamation, it had

specified the route of its proposed road as running "from a point upon the boundary line between the States of Idaho and Montana, near Mile Post No. 141 of the survey of said boundary line; thence extending in a westerly direction through Shoshone and Kootenai Counties and the Coeur d'Alene Indian Reservation to some convenient point to be located on the west boundary of the State of Idaho within the limits of said reservation." (Rec., 189.) It had, October 23rd, 1906, and prior to the date of the proclamation, filed maps of its proposed location in the Land Office of Coeur d'Alene, which maps were immediately transmitted to the General Land Office. (Rec., 191, 196.) As this was two weeks prior to the proclamation, it is certain that these maps had been received in the General Land Office before the proclamation was made.

As appellant had, by identifying itself as a grantee under the Act of March 3, 1875, become vested with the right to enter upon the lands afterwards included within the forest reserve for the purpose of constructing its road and taking material of earth, stone and timber from the adjacent lands therefor, and as it had specified a route which traversed the forest reserve, it had a valid claim to a right of way within the reservation, prior to the date of the proclamation, which was within the letter and spirit of the exception made therein for protection of existing valid claims.

Point II.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY DEPOSITING DEBRIS IN STREAMS.

The bill, charged that appellant has

> "thrown, rolled and deposited and is throwing, rolling and depositing great quantities of rock, earth,

gravel and debris in the Saint Joseph River in divers places and adjacent to said pretended right of way, whereby said Saint Joseph River has been and is obstructed and rendered wholly unfit and useless for purposes of navigation and log-driving, and will continue to be unfit and useless for purposes of navigation and log-driving until said rock, earth, gravel and debris is removed therefrom." (Rec., 29.)

It prayed that appellant be required "to cease and refrain from obstructing or continuing to obstruct the navigability of the Saint Joseph River" (Rec., 35); and that "plaintiffs may be accorded their damages." (Rec., 36.) These were the sole references to this matter. Appellant excepted to this allegation (Rec., 57, 519, 595); and also demurred thereto upon the grounds: (1) That the complainant had no interest in said matter; (2) that defendant was not answerable as to such matters to complainant, but to the State of Idaho; (3) that the complainant was not entitled to relief with respect to such matter. (Rec., 49-50.)

This demurrer having been overruled, it answered denying the allegation and alleging affirmatively that the river was a waterway wholly within the State of Idaho; that it was not navigable water of the United States, and that all of that portion of the river described in the bill was a swift mountain stream wholly unfit and useless for navigation.

The testimony introduced by the government (the appellant offered none upon this point) established that there were no obstructions placed in the Saint Joseph River itself, but that in the course of construction, rock and earth were thrown from the right of way into the *North Fork* of the Saint Joseph and into some of the tributaries of the North Fork, resulting in obstructions at various places, which were sufficient to interfere with the use of these small streams for log-driving purposes. (Rec., 262-5, 294, 299, 302-6, 308-10, 313-4, 318-9.)

This testimony further established that they were all small mountain streams, the largest of which (the North Fork) was navigable only for logs and small boats (Rec., 262, 272-3, 291, 294-5, 311-12, 315, 318, 324), and even this could not be driven for the greater portion of the year without splash dams. (Rec., 273, 312.) The tributaries of the North Fork could not be driven without splash dams, or other improvements. (Rec., 278-9, 335.)

Hamilton and Warner, testified to estimates of the cost of removing this debris, Hamilton estimating the cost at $4,100 (Rec., 296-9), and Warner at $3,500. (Rec., 313-4.) These estimates appear to have been carefully made, and were arrived at by figuring separately on the cost of removing each obstruction. A third witness, Seery, made a lump estimate of a total cost of $10,000, and added, "That would be a very rough estimate." (Rec., 336.)

All of the testimony as to the obstructions was given subject to appellant's objection that it was irrelevant and immaterial under the issues, was incompetent to prove any of the issues, and because damages of this character were properly the subject of an action at law and afforded no ground for equitable relief. (Rec., 262, 265, 291, 294, 300-1.) The trial court did not pass upon these objections, although assigned in the specification of objections (Rec., 104, 106, 107, 112), but awarded complainant $5,500 on account of stream obstructions. (Rec., 168.)

In all of these proceedings the court erred; and, regardless of other matters in the case, this item should be stricken from the judgment.

The claim on account of stream obstructions is totally disconnected from every other matter presented by the bill. It is not referred to in the stipulation which appellee demanded that appellant execute, nor in that which the court has embodied in the decree. And, in consider-

ing the sufficiency of the pleading as against the demurrer, and of the evidence as against the objections, to support this item of the money judgment, this part of respondent's claim must be considered as an independent cause of action.

(a) *Disregarding all claims of right in appellant to construct its railway in the National Forest and assuming that it was and is a trespasser, the bill is insufficient to support any decree or judgment on this matter.*

The bill does not allege that the streams obstructed are navigable waters of the United States and the evidence clearly establishes that they are not.

Leovy v. *U. S.*, 177 U. S., 621, 627, *et seq.*
U. S. v. *Rio Grande I. Co.*, 174 U. S., 690, 698-9.

Therefore, no question of a violation of any federal statute for the protection of navigation is involved. The utmost that can be claimed is that they are floatable streams, and as such public highways of Idaho for the transportation of logs. This being so, their obstruction is a nuisance at common law and under the laws of Idaho, which provide:

> "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street or highway, is a nuisance." (Sec. 3656, Idaho Rev. Code.)
>
> "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the nuisance or damage inflicted on individuals may be unequal." (Sec. 3657, Idaho Rev. Code.)
>
> "A private person may maintain an action for a public nuisance if it is especially injurious to him-

self, but not otherwise." (Sec. 3665, Idaho Rev. Code.)

"A public nuisance may be abated by any public body or officer authorized thereto by law." (Sec. 3666, Idaho Rev. Code.)

"Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance. And by the judgment the nuisance may be enjoined or abated as well as damages recovered." (Sec. 4529, Idaho Rev. Stats.)

This nuisance, if nuisance it is, being public, can be abated only by the public authorities thereto authorized, or at the instance of a private person to whom it is especially injurious. With respect to it appellant occupies the position of a private person. While the United States is the supreme government, its interest in small streams, such as are here involved, within the limits of a state sovereignty (at least, in the absence of special legislation) is not different from that of other land owners; and its rights to maintain an action on account of the obstruction thereof are not greater than would be the rights of a private individual, if he were the owner of the lands within the forest reservation.

U. S. v. *Oil Co.*, 232 Fed., 619, 631.

Mountain Copper Co. v. *U. S.* (C. C. A.), 142 Fed. Rep., 625, 629.

C. & D. Canal Co. v. *U. S.* (C. C. A.), 223 Fed. Rep., 926, 929-30.

Pollard's Lessee v. *Hagan*, 3 Howard, 212, 221, 224.

It is necessary then that appellee, in its bill to restrain the alleged nuisance, should allege facts showing special injury to it, and this it fails to do. It does not even allege directly that the Government owns lands abutting

upon the stream; it does not allege that the streams are navigable, or would be useful for any purpose of navigation or log-driving, if not obstructed; or that complainant owns any timber which would be transported by means of the streams; or that it has ever attempted to use or expects to use the streams for any purpose; there is not even a suggestion of any special injury to complainant of any kind. The absence of such allegations is fatal to the right to relief against a nuisance of this nature, either at law or in equity.

> "In case of public nuisance, the plaintiff must aver special damages to him, inasmuch as the law does not presume or imply damage to any particular individual from the public offense."
>
> 2 Sutherland on Damages (3rd Ed.), Sec. 421, p. 1167.

> "The plaintiff must suffer some special damage beyond that which is suffered in common to the public. This may be direct or consequential, and must be specially alleged."
>
> 4 Sutherland on Damages (3rd Ed.), Sec. 1058, pp. 3089-90.

And see

Joyce on Nuisances, Sec. 429.

Jarvis v. *S. C. V. R. Co. et al.*, 52 Calif., 438, 440.

Spooner v. *McConnell*, Fed. Cas. No. 13,245; 22 Fed. Cas., pp. 939, 947.

Ala. S. R. N. Co. v. *Ga. P. R. Co.* (Ala.), 6 So. Rep., 73, 74.

Innis v. *Cedar Rapids, etc., Ry. Co.* (Ia.), 40 N. W. Rep., 701.

Brennan v. *Lammers* (Minn.), 48 N. W. Rep., 766.

Clark v. *C. & N. W. R. Co.* (Wis.), 36 N. W. Rep., 326, 328.

S. C. S. Co. v. *S. C. R. Co.* (S. C.), 4 L. R. A., 209, 210, *et seq.*

S. C. S. Co. v. *W. C. A. R. Co.* (S. C.), 33 L. R. A., 541, 544-5.

Jones v *St. Paul, etc., Ry. Co.*, 16 Wash., 25, 27, *et seq.*

And see

Note in 59 L. R. A., p. 81, *et seq.*

(b) *The bill is insufficient to support a judgment for money damages for no damages are alleged.*

2 Sutherland on Damages (3rd Ed.), Sec. 421, p. 1167.

4 Sutherland on Damages (3rd Ed.), Sec. 1060.

(c) *There being no allegation of damages, and the court having refused to grant the injunctive relief asked, it was without jurisdiction to award money damages as compensation for the alleged injury.*

As the question of jurisdiction to award money damages in this proceeding in equity, arises not only with respect to this alleged nuisance, but also upon those portions of the decree awarding damages for timber burned and cut, such question will be hereafter considered by itself.

(d) *The amount of damages awarded by the court for this claim is not justified by the evidence.*

Three witnesses testified upon this point, two in careful detail as to the cost of removing the obstructions, the one fixing it at $3,500, the other at $4,100, the third witness, who stated that his was a rough estimate only, at $10,000. The amount awarded upon this account, $5,500, bears internal evidence that the plan pursued in arriving thereat was that which courts have uniformly condemned when pursued by juries, namely, an addition of the three estimates and a division thereof by three, with a slight reduction so as to make the total amount even hundreds of dollars.

Point III.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE ENTERED BY THE DISTRICT COURT FOR THE RECOVERY OF DAMAGES CAUSED BY THE DESTRUCTION OF TIMBER BY FIRE.

The bill, after charging various matters with respect to the withdrawal and reservation of the lands, the filing of maps by the railway company, the alleged agreement of Mr. Peck, the demand that defendant execute the stipulation attached to the bill as Exhibit "G," its refusal, and the consequent rejection by the Interior Department of the map of location filed, charges acts by appellant alleged to be wrongful, as follows: (a) The wrongful cutting of timber; (b) the depositing of debris in the St. Joe River; (c) that through lack of proper precautions numerous fires were set out, thereby burning a large amount of mature and seedling timber.

The prayer of the bill is (1st) that the defendant be required to execute and file the stipulation Exhibit "G"; (2nd) that it cease and refrain from obstructing the St. Joe River, and that it be ordered to cease from repeating the alleged wrongs and injuries and from cutting, or causing to be cut, any timber, and from constructing or operating its railway within the forest reserve

> *"until it shall have executed and filed with the Secretary of the Interior the said required stipulation and until it shall have complied with the laws of the plaintiffs and its said so-called amended map shall have been approved by the Secretary of the Interior";*

(3rd)—*and in the alternative*—that it be perpetually enjoined from continuing the alleged wrongful acts of cutting timber and constructing or operating its railway within the forest; and (4th) that the plaintiffs be accorded their damages. (Rec., 35-6.)

The bill thus divides the wrongs complained of into four distinct heads: (1) The refusal to sign the stipulation; (2) the destruction of timber by cutting; (3) the destruction of timber by fire; and (4) the depositing of obstructions in the river.

The trial court awarded respondent $12,000 on account of mature timber and $24,000 on account of immature timber, destroyed by fire.

As seen, the claim made because of stream obstruction had no connection with any part of the case alleged in the bill beyond the mere fact that such obstructions were made during the work upon the railway. The claim for timber burned was also a separate and distinct cause of action. It, like the nuisance claim, was based upon alleged tortious acts, viz: negligence in setting fires.

(a) *There was no equity in complainant's claim for damages for timber burned.*

Appellant demurred to so much of complainant's bill as set out a claim for damages for timber burned, upon the ground that there was no equity in such matter, that as to such claim complainant had an adequate remedy at law. (Rec., 50-51.)

It further interposed timely objections upon the same grounds to the testimony offered with respect to this claim. (Rec., 266, 300-1, 354, 362, 363.)

As there was no claim that the fires were started wantonly or intentionally, or that the Railway Company proposed to set out any other fires, or to permit them to be set out, there was no basis for injunctive relief so far as the fires were concerned, and this portion of the case presented a claim for damages pure and simple. It therefore afforded no basis for an appeal to the jurisdiction of a court of equity.

U. S. v. *Bitter Root Dev. Co.* (C. C. A.), 133 Fed. Rep., 274, 278-280.

U. S. v. *Bitter Root Dev. Co.*, 200 U. S., 451, 471, *et seq.*

So much of the decree as awards the respondent $12,000 on account of mature timber burned and $24,000 for immature timber destroyed by fire, is therefore erroneous.

(b) *The testimony offered as to the amount of timber burned was incompetent and the objections thereto should have been sustained.*

The only witness testifying as to the amount of mature timber burned was Mr. Seery, whose testimony appears at pages 326-339. He did not see the fires, but in September, 1908, cruised the burned district in conjunction with a Mr. Baker, whom the evidence tends to show was employed by the railway company. Mr. Seery nowhere testified directly to the quantity of timber which this cruise showed to have been burned, and his estimate of the quantity, which is made the basis of that part of the decree awarding $12,000 on this account, appears only in a report made by him to the Government, October 12, 1908, Appellee's Exhibit 35. (Rec., 330-1, 488-495.) This report, Mr. Seery testifies, was prepared in the following manner:

> "A. This paper you hand me is my report, the amount of timber of the various kinds. That report was made October 12, 1908.
>
> Q. Was it made at the time the estimate was made?
>
> A. Yes, I compiled this report every night. I took it first upon a notebook and afterwards when I went in at night I wrote it in, in ink, here. * * * No one assisted me in the preparation of this report, but Mr. Baker had an exact copy of it. We compared it and checked it over. When they were finished, I did deliver a copy of this report to Mr. Day."

Thereupon the report was offered in evidence and its

admission was objected to by appellant on the ground that it was a self-serving statement, incompetent and not properly verified. (Rec., 330.) If this objection is well founded, there was no competent evidence before the court as to the quantity of mature timber burned. That a report made by a subordinate agent to his superior would not ordinarily be competent evidence as against a third party is, of course, clear. The only theory upon which such report could be admitted is that it was in the nature of an original memorandum made upon the ground, in which event, where its accuracy was duly testified to, it would have been admissible; but the testimony of Mr. Seery, above quoted, shows that this was not the case. It was not an original memorandum or book of entry made by the witness, but was a compilation prepared by him from the original memoranda, which he testifies he had made; in this respect it is analogous to ledgers or others books which have been prepared from data entered in different and original books of entry. While the rule of evidence permits the introduction in evidence of a shopkeeper's books or similar books of entry where they have been regularly kept, such evidence is admissible only to the extent required by the impossibility of depending exclusively upon imperfect human memory; and the rule, being in the nature of an exception to the ordinary rules of evidence, does not extend beyond the necessity. It is therefore restricted rigidly to the books of original entry and does not extend to the inclusion of journals, ledgers or other compilations made from such original books. And as the record here offered was a subsequent compilation prepared from the original memoranda, which memoranda were not offered in evidence, the objection thereto was well taken and this exhibit should be stricken from the case.

Fitzgerald v. *McCarty,* 55 Iowa, 702; 8 N. W. Rep., 646.

Woolsey v. *Bohn*, 41 Minn., 235; 42 N. W. Rep., 1022.

Griesheimer v. *Tanenbaum*, 124 N. Y., 650; 26 N. E. Rep., 957.

State v. *N. Y., etc., Co.*, 49 N. J. Law, 392; 8 Atl. Rep., 290.

Watrous v. *Cunningham*, 71 Cal., 30; 11 Pac. Rep., 811, 812.

It is, however, unnecessary to multiply citations upon a proposition so elementary.

It is true that after the introduction of the report as an exhibit Mr. Seery was asked and answered as follows:

"Q. What does your report show to be the amount of the burned timber?

A. The amount of feet board measure of mixed timber comprises white pine, red fir, white fir, tamarack, cedar, hemlock and jack pine, and is 4,045,700 feet." (p. 331.)

It will be noted that the answer to this question is simply a statement as to what appears in the report and possesses no value as independent evidence.

(c) *The court erred in adopting the valuation of* $3 *per thousand for mature timber burned, and in using such valuation as the basis for the damages awarded for such burning.*

The court having held that the railway company was bound by the agreement made by Mr. Peck to enter into a similar stipulation with respect to the Coeur d'Alene National Forest, said:

"If this stipulation or agreement had been entered into in accordance with the Peck memorandum, the defendant would thereby have become obligated to pay to the plaintiff at the rate of $3 per thousand feet, board measure, for usable or merchantable timber cut upon the right of way and upon additional strips referred to in clause 1 of the agreement, and also to pay for any and all damages caused by fires, or otherwise sustained by the plaintiff, by reason of the use and occupation of the National Forest by the

> defendant. *Accordingly, I have adopted* $3 *per thousand* as the proper measure of value for the timber cut *and the mature timber burned,* and, *applying such measure,* I find that the plaintiff is entitled to recover from the defendant $26,989 for timber cut upon the right of way and contiguous lands, and $12,000 on account of mature timber burned." (Rec., 168.)

This distinct statement makes it certain that the item of $12,000 damages for mature timber burned, included in the total recovery of $68,489, is based upon a valuation of $3 per thousand, *adopted because that was the value which it was stipulated should be paid for timber cut,* and that it was not based upon any determination by the court as to what was the market value of the burned timber. The stipulation made for the purpose of securing the right of way through the Helena forest, Exhibit D, attached to the complaint (Rec., 38), provided, in clause 2, that the company would pay for timber *cut* "such lump sum as may be mutually agreed upon, or at the rate of * * * $3 per thousand feet, board measure, for usable or merchantable timber."

Clause 5 of the same section required the company to agree as follows:

> "To pay the United States * * * for any and all damages caused by fires, or otherwise sustained by the United States by reason of the use and occupation of said forest reserve by the company, * * *."

These provisions the court required inserted in the stipulation which it decreed that appellant should execute and deliver to secure the right of way through this forest. (Rec., 171, 173.)

It will be noted that, by these provisions, the valuation of $3 per thousand was limited to the timber *cut;* it did not extend to the timber *burned.* The agreement, if executed, would have bound the company, so far as the timber burned was concerned, to pay the *"damages"*

caused by the fire. This, unquestionably, left the measure of damages to be determined by the ordinary rules of law. This measure would include the market value at the time of the fire of the timber burned. If the parties were unable to agree as to this value, it would unquestionably have to be determined from the testimony of witnesses adduced in a judicial proceeding. There was clearly no thought that the valuation stipulated for timber cut, and which could be fixed with some degree of accuracy since the time of the cutting was approximately known, was to apply to timber which might be burned at different times in the future. And since there was no agreement fixing the value of timber burned, and would have been none even if the stipulation had been signed, the adoption of the value fixed for timber cut, as a basis for the measure of damages for timber burned, was erroneous.

Nor can this action be justified upon any theory that there was no other evidence as to the value of this burned timber. Witnesses had been called upon behalf of both respondent and appellant and had given testimony as to the market value of this timber. (Rec., 257-262, 267-271, 278, 279-283, 289-290, 291, 292-293, 301-302, 384-5, 386-390, 391, 394-398, 399-409, 409-413.)

It was the duty of the court to determine from this evidence what the market value was and to apply this market value to timber burned if any liability therefor in this proceeding, existed. The failure to perform this duty and the adoption of a valuation which nobody pretends was the market value, is fatal to a confirmation of that portion of the decree awarding appellant $12,000 for this item. As we do not conceive it to be the duty of this court to perform the work which the trial court should have done, and determine from a review of all of the testimony what the market value was; and as we be-

lieve that this court should, because of the clear error of the trial court in adopting the $3 per thousand valuation, remand the case for a determination as to the fair, market value, even if there be no other error; and because of the extreme length of this brief, we refrain from a discussion of the testimony as to the market value; but we content ourselves here with saying that the clear preponderance of the evidence shows that the market value of white pine was from $1 to $2 per thousand; that yellow pine was worth not to exceed 50 cents per thousand, and that other timbers had no market value whatsoever, as the cost of manufacturing logs therefrom exceeded the price for which such logs could be sold.

(d) *The evidence offered in behalf of the United States for the purpose of determining the damages from the burning of immature timber was incompetent and inadmissible.*

In addition to the item of $12,000 allowed for mature timber destroyed by fire, the decree awards $24,000 to appellee for immature timber so destroyed. The testimony with reference to the quantity of immature timber is brief. Mr. Seery testified (Rec., 331) that there were 1,344½ acres of mixed seedlings so burned. Mr. Rockwell testified that between July and November, 1909, using maps prepared by Mr. Seery for the purpose of locating a portion of the ground burned over, and having other burned areas pointed out to him by Ranger Kottkey, he examined the burned areas; that he then made a study of the timber in the vicinity, ascertaining what species were growing there, what the rate of growth was, and how much timber an acre of land would produce; that he selected the areas in adjacent unburned timber growing under similar conditions to those found on the burned areas, measured the timber in each area so selected; ascertained thereby how many trees there were,

and the diameter of each species; selected average trees of the various diameters, cut these down, ascertained the number of board feet therein contained, and the age of the tree. He further testified that he determined that the age at which timber of the class and character growing in this vicinity became merchantable was 100 years; that he then estimated the cost of caring for such immature timber until it should reach that age; and deducted this estimate from an estimate of the market value of the timber at the age of 100 years, an estimate based upon an assumption that timber would then have a market value of $4 per thousand stumpage, and discounted the valuation thus obtained to the present time by compound interest tables at 3 per cent. Elaborate tables of valuation obtained in this manner were put in evidence as Government's Exhibits 1A and 3A. The witness further testified to a *second* method of ascertaining the valuation of the immature timber, viz: that he had prepared tables showing the stand of young growth destroyed on the burned areas, together with the total cost to the Government of restoring the same areas to the condition in which they were before the fire occurred. In determining this cost the witness based his conclusions on a cost of $15 per acre for setting out the seedlings and added to this initial cost, interest thereon at 3 per cent. per annum, compounded, for a period necessary to bring such new timber to the age which he estimated the burned timber had arrived at, and added another item of 3 cents per acre per annum for the cost of protection. The tables thus prepared by the witness were introduced in evidence as Exhibits 2A and 4A. (Rec., 351-352.) The introduction of Exhibits 1A and 3A was objected to in so far as they purported to show values, for the reason that they were based upon an incorrect method of arriving at the value of the timber destroyed and for the further reason

that the witness was not shown to be qualified to testify as to values. (Rec., 349, 353.) The introduction of Exhibits 2A and 4A was objected to upon the ground that so far as such exhibits purported to show quantities of timber in the burned areas they were duplicates of Exhibits 1A and 3A; that in so far as they purported to show the cost of restocking and the value of timber arrived at in that manner, they were immaterial, irrelevant and incompetent, that not being a proper method to get at the market value of the young timber destroyed. (See Rec., 351, 354.) These exhibits were further objected to upon the ground that they were incompetent under the issues of this case, as the remedy for such damages, if any, was at law and the court of equity was without jurisdiction. (Rec., 354.)

At the close of Mr. Rockwell's testimony appellant moved to strike it out for the reasons assigned in the various objections interposed and for the further reason that it appeared that in his estimates of the cost he had allowed an unwarrantable rate of interest and had made no allowance for insurance, or the probability that the timber would have been destroyed from other causes, and upon the ground that the testimony was not competent as furnishing any basis for equitable relief. (Rec., 362.)

It was stipulated, subject to the same objections, that Mr. Morris, would, if examined at length, testify to the same facts as Mr. Rockwell. (Rec., 363.) This is all of the testimony adduced by the Government for the purpose of showing the market value of such immature timber, although Mr. Clifford testifies that the cost of procuring and planting seedlings would be approximately $15 per acre and that it would require 5 cents an acre per annum to properly care for and protect such seedlings after being planted (Rec., 366); and Mr. Silcox also gives testimony fixing the cost of caring for such seedlings after

being planted at approximately 3 cents an acre. (Rec., 367.) None of this testimony purported to show the market value of the immature timber.

The foregoing is a resume of all of the testimony given on behalf of the Government upon which the award of damages in the sum of $24,000 for the burning of immature timber is based.

Witnesses for appellant testified that these timber seedlings have no market value. Mr. Douglas saying:

> "When you are buying timber, seedlings are not considered at all. In cruising timber you do not estimate it where it is too small for logs." (Rec., 390.)

This testimony was undisputed.

It will be seen from this review of the evidence that the Government offered no testimony as to the injury to the land or as to the value of the immature timber. In lieu thereof it offered evidence to establish its alleged damages upon two distinct theories: *First*, by deducting from the estimated market value of the timber at its estimated age of maturity the estimated cost of bringing that timber from its estimated age to such estimated age of maturity. *Second*, by the estimated cost of reproducing the timber destroyed. Which theory the court adopted in arriving at its conclusion that the damages by reason of the destruction of the immature timber amounted to $24,000, we do not know. It must have adopted one or the other, for there was no other evidence before it upon which it could base a finding of more than nominal damages. Nor is it material which theory the court adopted, for neither was the proper measure of damages, and the testimony under each was inadmissible. The first method is purely speculative. There is much obscurity as to just how Rockwell and Morris determined the quantity, kind or age of the timber which had been burned the year before they made their investigation. The testimony leaves the impression that they guessed at

it from examination of areas of unburned timber in the vicinity which they assumed was of substantially the same quantity, age and kind. (Rec., 344.) It is certain, however, that they concluded that the age of maturity would be 100 years; that the immature timber in some areas was not to exceed fifteen years of age, requiring eighty-five years to reach maturity, in another area it was ninety years of age, requiring ten years to reach the age of maturity. They *assumed* a market value of $4 per thousand when the timber had reached that age; that is, that in one case timber would be worth that amount 10 years hence, and in another that such would be its value 85 years in the future. This theory further assumes that, but for this fire, the timber would have survived all dangers to which such timber is subject, and would have safely reached the age when it would have become a marketable product—an assumption paralleled only by the case of the maid who figured a fortune from a setting of eggs, but unfortunately stubbed her toe and lost her capital before the motherly hen could begin to set. Deprived, as we are, of all powers of prophecy, we do not know what the market value of logs on the St. Joe and its tributaries will be 85, or even 10, years hence. We do know that in all human probability this particular timber would have been burned in the year 1910 by conflagrations which swept this entire country and for which the Railway Company has never been charged with responsibility.

> "That country was pretty badly swept by fire last fall. The timber is practically all killed." (Testimony of Mr. Gregory, witness for complainant, Rec., 315. See, also, Rec., 358.)

This fire, so great as to amount to a national calamity of which the court will take judicial notice, is stated in the Department of Agriculture Bulletin No. 117, issued October 23, 1912, to have burned over approximately

2,000,000 acres. (*Bulletin,* p. 23.) Its cause is attributed, by forest supervisors and rangers, to lightning. (See article "A WORLD AFIRE," Everybody's Magazine of December, 1910, p. 754.) And that lightning is a prolific cause of forest fires is a well known fact. In Bulletin No. 117 above referred to, it is stated:

> "In the order of their importance, the following are the chief known causes of fires in the National Forests:—Railroads; lightning; campers; brush burning; incendiary; sawmills. Lightning is responsible for about 17.5 per cent. of the fires." p. 9. (See, also, Table of Statistics, p. 10.)

Clearly then, the possibility that a forest of immature timber may never mature, is an important factor to be taken into consideration in determining its value, and in the absence of statistics showing the probabilities of timber surviving to maturity (and it is not claimed that such statistics have ever been compiled), an attempt to arrive at the value of a body of immature timber upon the basis of its value at maturity, is the wildest of speculation. Counting chickens before they are hatched has never been recognized as good business; and it should not be permitted as a proper method of ascertaining damages in judicial proceedings where the period of incubation is from ten to eighty-five years.

The second theory upon which evidence for the purpose of ascertaining the Government's damages sustained by the burning of this immature timber, was introduced, viz.: the cost of reproduction, is scarcely less objectionable. Such cost bears little or no relation to the value.

The true measure of damages where immature timber is destroyed is the difference in value of the land upon which the timber was growing before and after the injury.

Miller v. *Kansas City Southern Ry. Co.* (Mo.), 167 S. W. Rep., 469.

People v. *N. Y. C. & H. R. Co.*, 146 N. Y. Supp., 490.

Dwight v. *Elmira C. & N. R. Co.* (N. Y.), 30 N. E. Rep., 398.

Ribblett v. *Cambria Steel Co.* (Pa.), 96 Atl. Rep., 649, 652.

Bullock v. *B. & O. R. Co.* (Pa.), 84 Atl. Rep., 421, 422.

Mahaffey v. *N. Y. C. & H. R. R. Co.*, (Pa.), 78 Atl. Rep., 143.

Southern Ry. Co. v. *Slade* (Ala.), 68 Southern Rep., 867, 870.

Steckman v. *Q. O. & K. C. R. Co.* (Mo.), 165 S. W. Rep., 1122, 1124.

Chase v. *Hoosac, &c., Co.* (Vt.), 81 Atl. Rep., 236, 237.

Cleveland School Dist. v. *G. N. Ry. Co.* (No. Dak.), 126 N. W. Rep., 995, 996.

S. L. & S. F. Ry. Co. v. *Hoover* (Kans.), 43 Pac. Rep., 854, 856.

C. & O. Ry. Co. v. *Baylor* (Va.), 86 S. E. Rep., 847.

No testimony whatsoever relative to the value of this land, either before or after the fire, was offered in evidence.

In the case of immature annual crops destroyed, some courts have held that the damages sustained are to be determined by evidence as to what the probable yield would have been, from which amount there is deducted the cost of caring for and harvesting the crop. Other courts have held that the measure of damages is to be determined by evidence of the cost of seeding and caring for the crop until it had arrived at the age at which it was destroyed plus the rental value of the land. The first of these methods has been abandoned as improper, even by some courts which originally adopted it. Thus, the Supreme Court of Minnesota says:

"So much of the Lommeland case as justified the

court below on the trial of this, to hold that evidence of events which occurred subsequent to the loss, such as the average product of yield of like crops under similar conditions and within reasonable limitations as to time, and of the future average market value of a matured crop, less the expense of harvesting and marketing, may be received when estimating damages will have to be overruled, and this leads to a reversal of the order appealed from through no fault of the trial court. The radical error in applying the rule warranted by the Lommeland case is made more apparent when we again allude to the fact that, because of it, and for the purpose of estimating his damages (in the fall of the year and within two months after the fire), plaintiff was permitted to show what his prospects ought to be for a crop of grass seed and hay the next summer, what the yield should be, and what, in all probability, the value of the seed and hay would be some ten months in the future, without taking into consideration the fact that the alleged destruction was in the fall of the year, and that a crop of some character and value could be raised on this land in the same growing period, and thus mitigate the injury and loss. An action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle, such an action cannot be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. * * * Evidence of matters occurring subsequently to the injury is not competent."

Ward v. *C. M. & St. P. Ry. Co.* 61 Minn., 449; 63 N. W. Rep., 1104.

And that this objection applies with much added force to growing timber which will not come to maturity for from ten to eighty-five years, cannot be doubted.

In *Bradley* v. *Iowa Cent. Ry. Co.*, 111 Iowa Rep., 562, 82 N. W. Rep., 996, 997, the court held that the cost of reproduction of growing trees was not a proper meas-

ure of the damages for their destruction. It had previously held that the cost of reproduction of meadows so destroyed was the proper measure of damages for injuries to property of that description. After announcing that the rule with reference to growing orchards was different, the damages in such cases being measured by the difference between the value of the property with the orchard and what it was worth without it, the court said:

> "The reason for the distinction this court has made in the manner of estimating the damages for the destruction of a meadow and those for the destruction of trees—and a hedge is to be considered the same as trees—is this:—The value of the use during the time lost is an important element. This can be accurately ascertained in the case of a meadow, but cannot as to trees or a hedge. How long it will take to get grass in a certain field can be foretold with substantial certainty; how long it will take trees or a hedge to attain a certain size is largely a subject of guess. In any case, it takes so long as to leave too much room for doubtful elements to enter into the calculation."

In *Mahaffey* v. *N. Y. C. & H. R. R. Co.,* 229 Pa., 285; 78 Atl. Rep., 143, the court, rejecting the cost of reforestation as a basis upon which to appraise the damages caused by the destruction of growing timber, said:

> "It was plaintiff's contention that the fire had practically destroyed the reproductive capacity of the land in this regard, and that only as assisted by actual reforestation could it be made to produce. Evidence was admitted to show the cost of such reforestation. If this evidence was intended as a basis for estimating plaintiff's damage, it was all wrong to admit it. The cost of restoring the property to its condition before the fire would not be the correct standard of measurement, but the difference in the market value of the real estate for any purpose to which a purchaser might devote it. We would regard the admission of this evidence as re-

versible error, were we not convinced that it was without prejudice to the defendant."

In *Mattis et al.* v. *St. L. & S. F. Ry. Co.*, 138 Mo. App., 61; 119 S. W. Rep., 998, the court held that the measure of damages for the destruction of the roots of a timothy or blue grass meadow, was the cost of reseeding and loss of rental value for the season lost in that process, but that "for wild grass * * * which is not produced from seed sown, and which, when once destroyed, cannot be restored in a season by the agency of man, a different rule necessarily applies, for the destruction of the roots of such production may be an injury to the land itself, and the damage would be the difference in that value before and after the fire."

In *Cleveland School District* v. *G. N. Ry. Co.*, 20 N. Dak., 124; 126 N. W. Rep., 995, an action to recover damages for the burning of young shade trees, the court charged the jury that the measure of damages was the difference between the actual value of plaintiff's property just before the fire and the actual value of the same property after the fire. The defendant tried the case on the theory that the cost of replacing the trees destroyed was the measure of respondent's damages. The Supreme Court affirmed a judgment in favor of plaintiff, holding that the theory of the defendant was erroneous and that the evidence offered upon such theory was inadmissible.

In *Steckman* v. *Q. O. & K. R. Co.*, 178 Mo. App., 375; 165 S. W. Rep., 1122, the court said:

> "The rule as stated in *Adams* v. *Ry.*, 139 Mo. App., 204, is that where the destruction of the thing includes but a temporary injury to the land, and the thing may be replaced in a comparatively brief period, the true measure of damages is the cost of replacing it, and the rental value of the land until it is replaced, but where the destruction of the thing

> inflicts more than a temporary injury, or the replacement would be impossible or tedious and uncertain, both in cost and result, the criterion is the damage inflicted on the market value of the land. The facts that fruit trees, hedge and blackberry bushes are attached to the soil and depend upon such attachment for life, sustenance and utility, and that when destroyed their replacement is tedious and a thing of uncertainty, both as to cost and result, have led to the rule which classes such things as belonging to the inheritance." (p. 1124.)

Inasmuch as the only evidence offered by complainant tended to show, as a basis for the damages claimed for the destruction of immature timber, the possible value of that timber when it reached the age of maturity, an age ranging from ten to eighty-five years, less the cost of caring for it until that period—a method which, at the outside, could only tend in a remote degree to establish the value of the immature timber as timber—and, in the alternative, the cost of reforestation, and no effort was made to show the difference between the value of the land as it was immediately before, and immediately after, the fire, there was no evidence upon which the court could base a finding as to the damages from this cause; and in the absence of competent evidence as to the damages, the court, if it could make a finding in favor of complainant at all, was restricted to a finding of nominal damages only. The finding of $24,000 as damages for the immature timber destroyed is, therefore, utterly unsupported by any competent evidence.

Before closing this subject, we call the attention of the court to the fact that there are no means by which the court can determine upon which of the two theories of complainant the trial court acted in making its finding. The testimony offered under each theory was objected to as incompetent. The court, however, did not pass upon the objection and did not indicate in its opin-

ion upon what basis it proceeded in allowing this item of $24,000 for the immature timber destroyed, and if one of the theories was correct (we think we have conclusively shown that neither of them was), we are left in the same position in which we would be if the court had given conflicting instructions to a jury, one of which was erroneous, the appellant being thereby prevented from knowing upon which instruction the jury acted. The giving of conflicting instructions is always reversible error, and where the court, trying the case without a jury, has proceeded upon one of two inconsistent theories, without designation of the theory adopted, the same result should follow.

Although these questions were fully argued in the Circuit Court of Appeals they were not considered in its opinion. (218 Fed., 288.)

(e) *The court was without jurisdiction to enter a decree for money damages in the present action.*

This question, with similar questions arising with reference to the money damages for stream obstructions and for timber cut, will be hereafter considered.

We respectfully submit that that portion of the decree awarding the complainant $12,000 damages, on account of mature timber, and $24,000 on account of immature timber, burned, should be vacated and set aside.

Point IV.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECREE FOR THE RECOVERY OF DAMAGES FOR TIMBER DESTROYED BY CUTTING.

In addition to damages for stream obstructions and for timber destroyed by fire, the appellee asserted in its bill a third distinct claim, for timber cut in clearing the right of way and extra widths which appellee required

appellant to cut. The bill charged that appellant had cut and caused to be cut the timber upon the 200-feet right of way and that it had cut and removed, a large amount of timber upon an additional strip of land above and adjacent to the right of way.

To these allegations demurrers were interposed upon the ground that there was no equity in such matters. (Rec., 51.)

The bill further charged that defendant had cleared and caused to be cleared and is clearing and causing to be cleared, portions of the lands for the purpose of constructing a railroad, and had constructed and caused to be constructed and is constructing and causing to be constructed such railroad; that it had destroyed and caused to be destroyed, and is destroying and causing to be destroyed, large amounts of small timber and young growth through unskilled methods of lumbering. To this portion of the bill the defendant also demurred upon the ground that there was no equity in such matters. (Rec., 51.)

In addition to these allegations, the 11th paragraph of the bill charged that defendant is now trespassing and committing waste upon the National Forest without any authority from the plaintiff. In the 12th paragraph it is further charged that defendant threatens and intends, without executing the demanded stipulation and without awaiting the approval of its map of location and without other authority from the plaintiff, to cut the defendant's timber from the reserved lands and commit other unauthorized acts of trespass and waste; and that unless restrained by injunction, it will do and perform such threats.

It will be noted that by these allegations two things are commingled; the one, acts wrongfully done and completed before the filing of the bill; the other, threatened

waste and trespass. The matter demurred to in the fourth and fifth paragraphs of the demurrer related exclusively to past acts, while that demurred to in the sixth paragraph related in part to past acts and in part to acts being committed at the time the bill was filed.

(a) *Damages for timber cut were not recoverable in this proceeding.*

We may concede, for the purposes of the argument under this point, that if the purpose of the bill had been in good faith to enjoin waste which defendant threatened and unless so restrained would unlawfully commit, a bill on the chancery side of the court for such injunctive relief would have been proper. It conclusively appears, however, that such injunctive relief was not what the plaintiff sought to accomplish by this proceeding. *First,*—The Railway Company began construction within the reserve about July 10, 1907, and completed its work about July 31, 1909. (Rec., 234-5.) The Government was notified that the Peck agreement had been signed under a mistake of fact and that the company objected to signing a stipulation, early in October, 1907. (Rec., 373-375, 379-381.) Formal notice that defendant would not recognize the Peck agreement was given to the United States December 2, 1907. (Rec., 225-229.) The Railway Company continued its work with the full knowledge of the Government (Rec., 226-229, 235-247); and no action was taken by the Government to stop the same until the filing of the bill in the present case, June 23, 1909 (twenty months after such first notice) and about a month prior to the completion of the road *and after all work of clearing must have been completed. Second,*—What the Government sought to accomplish was to compel defendant to execute and file the stipulation, Exhibit G, as a specific performance of the promise

contained in the Peck agreement of May 10, 1907. This is made clear by the prayer for relief which asked that defendant be required to execute this stipulation Exhibit G, and be enjoined "*until it shall have executed and filed with the Secretary of the Interior the said required stipulation and until it shall have complied with the laws of the plaintiffs and its said so-called amended map shall have been approved by the Secretary of the Interior,*" and the alternative character of the further prayers for injunctive relief. The injunctive relief was thus but ancillary to the primary demand for specific performance. It was but an attempt to use a threatened injunction as a whip to compel defendant to enter into the contract embodied in the stipulation. If the defendant would enter into such contract no injunctive relief was desired. This being the situation, the injunctive feature of the bill must stand or fall with the sufficiency of the allegations to support the prayer for specific performance. If the court should hold that plaintiff was not entitled to demand the execution of the stipulation, it could not with grace indirectly compel the execution of such stipulation by enjoining appellant until such time as it had signed it. For these reasons, the injunctive features of the bill were not sufficient upon which to base the equitable jurisdiction of the court.

There being no equity in the injunctive feature of the bill, the attempt to secure a money judgment for the timber cut prior to its filing, is purely and simply an application to the equity court to award damages for an alleged trespass; that a court of equity cannot do this has been decided.

U. S. v. *Bitter Root Dev. Co.*, 200 U. S., 451, 472, *et seq.*

U. S. v. *Bitter Root Dev. Co.* (C. C. A.), 133 Fed. Rep., 274, 278, *et seq.*

For these reasons the court should have sustained the fourth and fifth paragraphs of the demurrer at the least; and should have refused to have included in the money judgment the item of $26,989 awarded for timber cut.

All of the testimony concerning timber cut and the values thereof was given subject to appellant's objection that there was no equity in such matters, and that such evidence was incompetent and immaterial under the issues of the case. It was stipulated that this objection should be considered as going to the testimony of all of the complainant's witnesses. (Rec., 300-301.) This objection was well founded; and the testimony introduced thereover should not be considered.

(b) *There is no competent evidence as to the quantity of timber cut.*

In addition to the general objection referred to there was a special objection to the testimony of Mr. Skeels, who was the only witness called by the Government to testify with respect to the quantity of timber cut. Mr. Skeels testified that he had a report of the cruise made by himself of the timber cut; that his estimate showed the amount of timber cut in the forty-acre subdivisions and the number of trees which they cut over in each forty acres. He further testified:

> "At the close of each day I worked up my notes and entered the data on the map. The report wasn't submitted to my superior in the Forest Service until I had finished my work. This report now before me was in nearly every case made at the close of the day when the estimate was made; *sometimes I might go two or three days before I worked up the data on these maps in my report,* but it would depend a good deal on the way the work went. * * * *In many of these sheets the report or memoranda before me was made the same day as the estimates were made; in other cases it might be a day or two days.*" (Rec., 255.)

During the course of the testimony of the witness repeated objections were made to the use of the memoranda and reports as substantive evidence; that according to the witness' statements the documents which he was asked to read into the record were not his original memoranda but compilations prepared by him therefrom and therefore not admissible as books of original entry; that not being admissible evidence in themselves they could not be gotten into the record by having the witness read them into it. (Rec., 256.)

The witness was then asked to refresh his memory from the memoranda and state the amount of timber of each subdivision prepared by him and to state any independent knowledge that he had. In answer thereto he testified as to the quantity of timber cut from the S. E. ¼ of the S. E. ¼ and the S. W. ¼ of the S. E. ¼ of Section 26, Township 47 North, Range 3 East. Without further questions or testimony by the witness, Exhibits 2 to 33, inclusive, being the compilations prepared from the original memoranda, were read into the record and received in evidence over the same objections on behalf of defendant, namely, that these documents were not the original memoranda and therefore not admissible in evidence. (See Rec., 256, 257.) After Exhibits 2 to 33, inclusive, had been received in evidence, the witness identified a report which he made to the Forester of the Forest Service stating the amount of timber which was cut by defendant on the right of way and adjacent strip and that it was a compilation made from Exhibits 2 to 33, inclusive. This compilation was then offered in evidence and admitted over the appellant's objection to its competency. (Rec., 257.) This is all of the testimony as to the quantity of timber cut. The witness did not testify as to the quantity of timber cut upon any subdivision other than the two forty-acre tracts above referred

to and did not testify as to the aggregate quantity of timber. The entire evidence as to the quantity of timber claimed to have been cut is embodied in the Exhibits 2 to 33, inclusive, and the compilation therefrom, Exhibit 34. If, for the reasons specified in the objections, these exhibits were not properly admissible in evidence, there was and is no testimony before the court as to the quantity of timber cut.

That these exhibits were not the original memoranda made by the witness during his cruise of the quantities of timber cut, is clear. They are statements written up by him at the close of the day, sometimes after the lapse of two or three days, from the notes he had taken during the day. They occupied with respect to such notes, the relation of a ledger to a day book; and that not being the original books of entry, they were not admissible in the absence of the original notes, is elementary law.

Fitzgerald v. *McCarthy* (Ia.), 8 N. W. Rep., 646.

Woolsey v. *Bohn* (Minn.), 42 N. W. Rep., 1022.

Griesheimer v. *Tanenbaum* (N. Y.), 26 N. E. Rep., 957.

State v. *N. Y. & N. J. T. Co.* (N. J.), 8 Atl. Rep., 290.

Watrous v. *Cunningham* (Calif.), 11 Pac. Rep., 811, 812.

It is urged that even though the exhibits might not be admissible themselves, yet the witness could use them to refresh his memory. The difficulty with this is that he did not use them to refresh his memory. It was the exhibits themselves which were put in evidence. If they be stricken as they should be, there is not one word of testimony as to the quantity of timber cut, except on the two forty-acre tracts referred to.

(c) *The court was without jurisdiction to enter a decree for the recovery of money damages for timber cut.*

We shall hereafter discuss more fully and in connection with the similar questions arising with respect to the obstruction of streams and the burning of timber, the question of the jurisdiction of the court, sitting as a court of equity, to enter any decree for the recovery of money in this cause.

We respectfully submit that the trial court erred in awarding any recovery of money for the timber cut.

Point V.

THE UNITED STATES COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE RESPONDENT WAS NOT ENTITLED TO EQUITABLE RELIEF.

The bill is primarily one for the specific performance of the Peck agreement of May 10, 1907. There is coupled with this a demand for injunctive relief until such time as defendant shall execute the stipulation Exhibit "G."

This demand for injunctive relief is not asked as an independent relief but only as a means of compulsion. Following this portion of the prayer for relief there is a prayer in the alternative for injunctive relief, and, coupled therewith, a further demand for purely legal relief, "that the plaintiffs may be accorded their damages." As the demand for damages affords no basis for invoking the aid of a court of equity, the case must fail on the chancery side of the court unless a case is made for equitable relief in the nature of the specific performance of the Peck agreement, or for injunctive relief.

The sufficiency of the bill was challenged by a demurrer thereto upon the ground that it was without equity and did not set forth any matters entitling complainant to any relief in the chancery court. (Rec., 52.)

(1) *There is no case alleged or made for equitable relief in the nature of specific performance.*

The alleged agreement, specific performance of which is demanded, is that embodied in the paper writing, Exhibit "C" annexed to the bill executed by Mr. Peck May 10, 1907. (Rec., 37.) (See statement of facts.)

This promise of Mr. Peck and qualified acceptance by the Forester, did not constitute an agreement the specific performance of which would be enforced by a court of equity, nor is it aided in this respect by any subsequent proceeding.

(a) *The agreement was for the doing of acts which, under the allegations of the bill, were illegal.*

The bill does not allege any facts showing that appellant was a grantee under the Act of 1875, or charge that appellant ever filed a certified copy of its articles of incorporation or proofs of its organization thereunder with the Secretary of the Interior, and thus fails *in toto* to show that appellant was entitled to any of the benefits of that act. The explanation of this failure to show that appellant was a qualified grantee under the Act of 1875, is found in the theory of the Government that the Act of March 3, 1899, was in itself a granting act under which a railway corporation could secure a grant of a right of way through a forest reserve by the approval by the Secretary of the Interior of its surveys and plats of right of way filed with him, and this regardless of whether it had complied with the Act of March 3, 1875, by filing a copy of its articles of incorporation and proofs of its organization, or not.

The bill being drawn upon this theory and omitting, as it does, allegations showing the acceptance by appellant of the provisions of the Act of March 3, 1875, its sufficiency as against the demurrer interposed must be

determined, in the first instance, upon this basis. If, contrary to the Government's contention, the Act of 1899 does not make a grant or authorize the Secretary of the Interior to make one or give permission to occupy a forest reserve for railway purposes, or, even if the Act of March 3, 1899, does make a grant or authorize the Secretary to give permission to occupy a forest reserve for railway purposes, but restricts such grant or authority to railway companies which have accepted the provisions of the Act of 1875,—the bill was clearly insufficient, for the alleged agreement contemplated the entry into, and the construction of a railway within, the forest reserve by a corporation which, according to the allegations of the bill, had not accepted the provisions of the Act of 1875.

We have, in Point I, fully considered the provisions of the Act of March 3, 1899, and have shown that that act in itself neither made a grant of a right of way, nor authorized the Secretary of the Interior to make such grant, or to give permission to occupy forest reservations for railway purposes.

We have also shown under that point, that the Act of March 3, 1899, was supplemental to, and amendatory of, the Act of March 3, 1875, and a necessary consequence of this relationship between the acts is, that the Act of March 3, 1899, has reference to such railway corporations, and to such only, as, by compliance with the provisions of the Act of March 3, 1875, had identified themselves as grantees under that act.

It follows that, according to the allegations of the bill, appellant was a railway corporation to which no privileges of construction within a forest reserve had been granted, and to which the Secretary had no authority to grant such privileges.

Not only was the Secretary without authority to grant

privileges within a forest reserve to a railway corporation of the class to which, according to the bill, appellant belonged, but the granting of the privileges and the doing of the acts which the writing of May 10, 1907, contemplated, were in direct violation of prohibitions and restrictions contained in the acts of Congress relative to the forest reservations.

According to the writing of May 10, 1907, Mr. Peck agreed, on behalf of the company, that it would "execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulations and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

For the purpose of avoiding confusion, we desire to note here that, although the writer of this paper apparently considered appellant as the same company that had executed the stipulation with respect to the Helena National Forest, such is not the case. The Helena National Forest stipulation was executed by the Chicago, Milwaukee & St. Paul Railway Company of Montana, a separate and distinct corporation. (Stipulation, Par. 13; Rec., 213-219.)

By this stipulation the company agreed to keep clear of all timber and other inflammable substances, the proposed right of way and all land in the forest reserve lying within 250 feet of its center line, except such land as the Forester should specifically exclude in writing; and to pay for such timber and wood so cut in clearing such right of way, or, to pile such timber and wood as the company did not wish to use or sell, leaving it available for sale by the Forester; in which event, the company was to transport the timber and wood at established freight rates and put in necessary sidetracks for the

handling of the same. The stipulation thus contemplated the cutting and sale of timber within the forest reserve, such sale to be made to the Railway Company if it elected to purchase, at the prices fixed in the stipulation. These provisions were in direct conflict with the Act of June 4, 1897, as amended by the Act of June 6th, 1900. (30 Stat., 35; 31 Stat., 661; 7 Fed. Stats. Ann., 313-14), which provided:

> "For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised, so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value, in such quantities to each purchaser as he shall prescribe, to be used in the state or territory in which such timber reservation may be situated, respectively, but not for export therefrom. *Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the state or territory where such reservation exists;* Provided, however, that in cases of unusual emergency, the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale. * * *"

These provisions, by which the Secretary, for the purposes and under the limitations named, was authorized to sell timber from the forest reserves, prohibited a sale by him of such timber for other purposes or in disregard of such conditions. The stipulation which contemplated a sale to the Railway Company, without ad-

vertisement and at a fixed price, of all of the timber cut upon the right of way and extra widths, was in direct violation of this limitation, even as the use and occupation of the reserve for railway purposes was in violation of the implied limitations contained in the Act of 1897, authorizing the Secretary to permit such use and occupation for certain specified purposes only. And unless the authority of the Secretary to make such agreement with the Railway Company as the stipulation contemplated can be found in some other act of Congress, the proposed stipulation was void because illegal and prohibited by the Congressional enactments above referred to. As neither the Act of March 3, 1875, nor the Act of March 3, 1899, authorized the Secretary to grant permits for occupation of a forest reserve by a Railway Company which had not complied with the provisions of the Act of March 3, 1875, nor authorized the Secretary to sell timber from the reserves in the manner contemplated by the stipulation, and there is no other act from which such authority could be derived, it follows that the stipulation, when made with such a company as the bill considers appellant, contemplated illegal and prohibited acts; and an agreement to enter into such a stipulation will not be decreed.

The bill, therefore, was insufficient as a bill for the specific enforcement of the alleged agreement.

(b) *There was no consideration for the promise embodied in this writing.*

The answer and proofs establish that the defendant had, in fact, accepted the provisions of the Act of March 3, 1875, and identified itself as a grantee under that act, in February, 1906, more than a year prior to the date of the paper executed by Mr. Peck. As we have shown under Point I, it was vested with full power and authority,

by virtue of such acceptance and identification, to enter upon, and construct and maintain its road through this reserve, and to take for purposes of construction material of earth, stone and timber from the lands adjacent to its line. Being vested with these rights at the time the writing of May 10, 1907, was signed, under the direct grant from Congress, the attempted imposition of terms and conditions by the Interior Department upon its exercise thereof, was a nullity.

State v. *N. P. Ry. Co.* (Minn.), 108 N. W. Rep., 269, 271.

Shortle et al. v. *T. H. & I. R. Co.* (Ind.), 30 N. E. Rep., 1084, 1085.

City of Newton v. *C. R. I. & P. Ry. Co.* (Ia.), 23 N. W. Rep., 905-906.

4 Pomeroy's Eq. Jur. (3rd Ed.), Sec. 1405.

(c) *The alleged agreement of May* 10, 1907, *was never accepted or ratified by the Railway Company.*

The paper writing was, upon its face, a promise and agreement signed by Mr. Peck and purporting to be made by him "on behalf of the company."

The Court of Appeals, in its opinion, says:

> "Peck was the General Counsel of the defendant Railroad Company, and unquestionably authorized, in furtherance of its purpose in acquiring a right of way across the Coeur d'Alene Reserve, to enter into just such an agreement as he did. In implicit reliance upon said agreement, and in full pursuance of its intendment, the plaintiff, acting through its duly authorized officer, granted immediate permission to enter upon the construction of its railroad across the reserve, and this prior to any approval of the surveys and plat of the company's right of way." (Rec., 588.)

This statement ignores the uncontradicted testimony and the express language of the approval endorsed upon the paper writing by the Forester. Mr. Peck testified:

> "I was not the General Counsel for the Idaho

> Company and I did not know until sometime afterwards that I had been put down as General Counsel of the Idaho Company. I did not see it and did not notice it. It was an oversight, an inadvertence, and undoubtedly was written by some of the clerks or people connected with the Forest Service who did not understand the situation. Certainly the title was not written on by myself." (Rec., 371.)

(See, also, testimony of Mr. Field, Rec., 378, 379.)

And that the Forestry Department officers understood that Mr. Peck did not have the authority to bind the company which the opinion of the Court of Appeals attributes to him, is placed beyond question by the language of the approval endorsed upon this writing by the Forester, viz.: "Approved and advance permission given to construct, *subject to ratification hereof by the company.*"

This language made the permission subject to the express condition that the promise of Mr. Peck should be acted upon and ratified by the company itself. This was never done. Upon the contrary, the company, through its officers, as soon as their attention was brought to this paper refused to ratify it, contending that the company's rights, under the Act of 1875, were operative within the reserve without the approval of the Secretary.

Mr. Peck testified:

> "The officers of the Idaho Company I conferred and acted with in respect to the matter of said right of way, were Mr. H. H. Field, General Counsel of that company, and *I think* H. R. Williams, President, both located in Seattle." (Rec., 369.)

Mr. Field testified that he first learned of the execution of this paper writing by Mr. Peck through advices given him by Mr. Peck in Washington in October, 1907. (Rec., 379.)

There is no testimony suggesting that any previous notice thereof had been given to the President, H. R. Williams, or to any other officer of the company, nor is it at

all probable that any such previous notice had been given. Mr. Field, as General Counsel, was primarily in charge of these matters. He was, as shown by Mr. Peck's testimony, the principal official with whom Mr. Peck was communicating; and in the total absence of any evidence to the contrary, it must be assumed that the notice to Mr. Field in October, 1907, was the first notice ever communicated to the company of the existence of this instrument. This presumption is further supported by the action which was taken with respect thereto.

Immediately upon being advised by Mr. Peck, or by the Forestry officials, of the existence of this paper writing, Mr. Field informed Mr. Peck of the difference in the conditions existing with respect to the right of way through the Coeur d'Alene Reserve and those which had existed with respect to the right of way through the Helena Forest, and Mr. Peck and Mr. Field at once advised the Government officials with whom they were negotiating, of the fact that the paper had been signed by Mr. Peck under a misapprehension. (Testimony of Mr. Peck and Mr. Field Rec., 368-384.)

November 15th, 1907, when the Forestry officials delivered the stipulation which they were demanding to appellant, with a request for its execution, the company at once advised the Forest Supervisor, through whom the demand was made, that it "would not sign such stipulation but would await the outcome of certain negotiations which were pending at Washington, D. C., with the officers of the Interior Department and of the Department of Agriculture of the United States." (Rec., 225.)

December 2, 1907, Mr. Peck notified the Forester of the United States Department of Agriculture at Washington, that he was not authorized to make any stipulation with respect to the right of way through the Coeur

d'Alene National Forest, different from that which had been made for the right of way by the Washington corporation through the Yakima National Forest. (Rec., 225.) The Government officials understood this to be, as it was intended, a clear refusal by the Railway Company to ratify the action of Mr. Peck in signing the paper of May 10, 1907. This is made clear by the telegram of December 2, 1907, sent by Mr. Price to Mr. Rutledge, Forest Supervisor of the Coeur d'Alene Forest, and by the memorandum made by Mr. Wells, Law Officer of the Forestry Service. (Rec., 226-229.)

The telegram reads as follows:

> "Chicago, Milwaukee & St. Paul claims right to construct without stipulation and without paying for timber destroyed. While negotiations are pending allow construction to proceed. Friendly suit probable. Letter follows."

The work of construction performed between May 10, 1907 and October, 1907, when the company first received notice of the writing of May 10, 1907, cannot be considered as performed by the company in reliance upon that paper, or as a ratification of Mr. Peck's action. The notice at once given to the officials of the Forestry Department that this paper had been signed under a misapprehension, the refusal of the company to sign the stipulation when presented November 15, 1907, and the express advice given to the Forester at Washington, D. C., on December 2, 1907, that the Railway Company claimed the right to construct its road through this Forest Reserve without stipulation and without paying for timber destroyed, make it clear that the work performed subsequent to the time when the company received notice of the paper writing, was not performed in the exercise of any privileges conferred by that writing, but was performed by it in the assertion of rights which it claimed independently of the writing. No implied ratification

of Mr. Peck's action can, therefore, be based upon the construction of the road by the company in the forest. It was not doing that work by virtue of a permission secured by means of the writing, but under an assertion of rights claimed by virtue of its compliance with the Act of March 3, 1875, and of this fact the United States was directly advised not later than December 2, 1907. In this connection, we may note that the great bulk of the work which it did in the forest was performed subsequent to December 2nd, 1907, when, at the latest, the Government had been advised that the company would not ratify the paper writing of May 10, 1907. (Stipulation, Par. 18, p. 234.)

It thus appears that the agreement embodied in the writing, the specific performance of which is sought, was expressly made by the Government subject to ratification by the company, and that it was not only not ratified by the company, but, on the contrary, was directly and distinctly repudiated. Under these conditions, no decree for its specific performance can properly be made.

(d) *The agreement of May* 10, 1907, *was lacking in mutuality.*

> "It is a general principle that when, from personal incapacity, the nature of the contract, or for any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."
>
> *Marble Co.* v. *Ripley,* 10 Wall., 339, 359.

And see:

Shubert v. *Woodward* (C. C. A.), 167 Fed. Rep., 47, 55.

Taussig v. *Corbin* (C. C. A.), 142 Fed. Rep., 660, 665-6.

Fed. Oil Co. v. *Western Oil Co.* (C. C. A.), 121 Fed. Rep., 674, 677.

Pullman Palace Car Co. v. *T. & P. R. Co.*, 11 Fed. Rep., 625, 630.

Ross v. *U. P. Ry. Co.*, Fed. Cas. 12080 (pp. 1245, 1248).

Norris v. *Fox et al.*, 45 Fed. Rep., 406, 407.

Wadick v. *Mace* (N. Y.), 83 N. E. Rep., 571, 572.

Deitz v. *Stephanson* (Ore.), 95 Pac. Rep., 803, 807.

Chambers v. *Roseland* (So. D.), 112 N. W. Rep., 148, 149.

Fowler Utilities Co. v. *Gray* (Ind.), 79 N. E. Rep., 897, 898.

Ochs v. *Kramer* (Ky.), 107 S. W. Rep., 260, 263.

Levin v. *Dietz* (N. Y.), 87 N. E. Rep., 454, 455-6.

Greinel v. *O'Connor*, 118 N. Y. S., 1053, 1054.

Riker v. *Comfort*, 124 N. Y. S., 1106, 1107.

Redwine v. *Hudman* (Tex.), 133 S. W. Rep., 426, 429.

Jolliffe v. *Steele* (Cal.), 98 Pac. Rep., 544, 545.

Chadwick v. *Chadwick* (Ala.), 25 So. Rep., 631, 633.

Solomon v. *Wilmington S. Co.* (N. C.), 55 S. E. Rep., 300, 303.

4 Pomeroy's Eq., Sec. 1405 (3rd Ed.).

That the objection of lack of mutuality in the beginning may be removed when the unenforcible provision has ceased to be executory, is undoubted, but this rule finds no application to the facts in the case at bar.

The writing of May 10, 1907, clearly contemplated something more than a bare license to appellant, terminable at will by the Government, to proceed with the construction of its work. There was clearly implied therein that if appellant signed the stipulation, its maps should be approved and all question as to its title to a right of way put at rest. The agreement would not be an ex-

ecuted one on behalf of the Government without such approval of the maps of location and final determination of such rights. But that the Government officials could not be compelled by any direct proceeding to execute such maps, is certain. They had, at the time of the filing of the bill, acquiesced in the construction of the road, but they had taken no action looking to the securing to the Railway Company of any evidence of its title or for the protection of permanent rights, and to this extent, the contract, if it was one, was purely executory. Moreover, even when filing the bill, the Government made no offer to execute the contract upon its part or to do equity by approving the map, even though appellant should execute the stipulation. It demanded equitable relief but made no offer to do equity. The necessity of the Government completing the contract upon its part was recognized in the supplemental decision of the trial court and in the decree which requires the Secretary of the Interior to approve the maps. (Rec., 167-174.) But this provision of the decree recognizes that the contract, so far as the Government is concerned, was still executory at the time of the filing of the bill, that the memorandum of May 10, 1907, was lacking in mutuality and had not been performed, or offered to be performed, by the Government so as to take the case as made by the bill out of the rule requiring mutuality as a condition precedent to the entry of a decree of specific performance. Neither is this requirement embodied in the decree a substitute for the failure of the Government to do, or to offer to do, equity, by the approving, or offering to approve, the maps. Indeed, some doubt must exist as to whether in this portion of the decree requiring the Government to approve the maps, the court has not exceeded the authority vested in the judicial department of the Government. That a court cannot, by direct proceedings, require the Executive De-

partment of the Government to approve a map of location, is unquestioned; and whether it can constitutionally accomplish this result in the indirect manner adopted by the decree in this case, is far from clear.

(e) *The agreement of May* 10, 1907, *was too uncertain for specific performance.*

The agreement was to "execute and abide by stipulations and conditions * * * such stipulations and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest." The contract to be executed is not to be a duplicate of the previous contract but to be as nearly like it as practicable. What would be as nearly as practicable is a matter upon which parties may well disagree. The stipulation Exhibit "G," submitted by the complainant and the execution of which it demanded as the principal relief in its bill, may fairly be taken to represent its ideas of what was "as nearly as practicable like" the Helena forest stipulation. The trial court held that such demanded stipulation did not comply with this term of the Peck agreement; and substituted another therefor. (Rec., 165-7.) The respondent is clearly estopped to now contend that the reference to the Helena National Forest stipulation was sufficient to make the proposed agreement clear and certain, or that the minds of the parties met thereon. It is in this dilemma: If it now contends that the provisions of the Peck agreement were clear and certain, it must concede that the stipulation, Exhibit "G," was deliberately framed by it for the purpose of obtaining under compulsion an advantage over appellant to which the Peck agreement gave it no claim, and that its conduct in demanding the execution of that stipulation and seeking to penalize appellant for its refusal to execute the same, was inequitable and unjust, an ad-

mission which must exclude it from a court of chancery, since applicants to such courts must come with clean hands; or, as the only alternative, it must contend that the demanded stipulation Exhibit "G," is "as nearly as practicable like" the Helena stipulation, a contention which involves, in view of the decree, an admission that the Peck agreement was not certain and clear in defining the terms of the stipulation which the Railway Company was to execute. We think it is clear that the minds of the parties never met upon the terms of the stipulation to be executed, and that therefore the Peck agreement is too uncertain for specific performance.

Zimmerman v. *Rhodes et al.* (Pa.), 75 Atl. Rep., 207, 208.

Croft v. *Hanover F. Ins. Co.* (W. Va.), 21 S. E. Rep., 854, 855.

Strang v. *R. P. & C. R. Co.*, 93 Fed. Rep., 71, 75.

Shumway v. *Kitzman* (So. D.), 134 N. W. Rep., 325, 328.

Van Dyke v. *Norfolk S. R. Co.* (Va.), 72 S. E. Rep., 659, 664.

L. N. A. & C. Ry. Co. v. *B-B Stone Co.* (Ind.), 39 N. E. Rep., 703, 707-708.

Solomon v. *Wilmington S. Co.* (N. C.), 55 S. E. Rep., 300, 302.

Morey v. *Terre Haute T. & L. Co.* (Ind.), 93 N. E. Rep., 710, 714-15.

4 Pomeroy's Eq., Sec. 1405 (3rd ed.).

(f) *This agreement, assuming it to be the agreement of the appellant, is an agreement to make an agreement. Courts will not decree the specific performance of such agreements.*

"Nothing is better settled than that equity will not compel the specific performance of an agreement to make an agreement."

Hoskins v. *Ryan* (N. J.), 64 Atl. Rep., 436, 437.

Lane v. *Rector, etc.* (N. J.), 45 Atl. Rep., 702, 703.

Ridgway v. *Wharton,* 6 H. L. Cas., 268.

And see:

Allegheny B. B. Club v. *Bennett,* 14 Fed. Rep., 257.

Geer v. *Clark,* 82 N. Y. Supp., 87.

An agreement to make an agreement is a contradiction in terms. If the minds of the parties have met upon all of the terms and provisions of the proposed contract, then is the contract complete. If they have not so met, a court of equity could not compel the execution of the agreement to make an agreement without making for the parties the agreement to be entered into, and this it will not do.

While it is true that there are exceptions to the rule, such exceptions are not broad enough to cover such an agreement as that here sought to be enforced. The agreement which it was demanded the company should make, and that which the lower courts have by decree commanded appellant to enter into, is one principally for the payment of money at a fixed rate for timber cut and to pay for timber damaged by fire. The enforcement of such an agreement would not be an exception to the rule, but involves an abrogation of the rule, for if the company may be required to execute this agreement it will be very difficult indeed to find any agreement which would not also be an exception to the rule. It does not come within the reasons which have been assigned for sustaining any of the exceptions which have been made. Thus, courts of equity decree the performance of covenants of indemnity "upon the principle on which the court entertains bills *quia timet.*"

Champion v. *Brown,* 6 Johns. Ch., 398, 406.

It may be further noted that suits to enforce contracts

of indemnity do not require the execution and delivery of further executory contracts.

It is not within the principle upon which contracts to execute and deliver mortgages are specifically enforced, for the execution of such contracts is required upon the principle that the creditor, having loaned money where presumptively he would not have accepted the credit of the debtor without the additional security, and having acquired thereby an equitable lien upon the property, the court for his protection and to prevent the defeat of his claims by conveyances to innocent purchasers, will require the formal instrument evidencing the lien to be executed, and the better doctrine is that courts of equity will not decree the specific performance of an agreement to execute a mortgage unless there is some special equity alleged and shown.

Brown v. *E. Van Winkle G. & M. Works* (Ala.), 6 L. R. A. (N. S.), 585, 590.

Agreements to deliver insurance contracts are enforced because "in an action at law the plaintiff would recover only nominal damages for the failure to issue the policy and that proceedings at law if loss has occurred would be more complicated and embarrassing than upon the policy."

36 Cyc., 568, *Note* 69.

(g) *The stipulation which the respondent demanded that appellant execute, and that which the court in its decree has required it to execute, are in excess of the executive authority.*

> "If, in the granting of a location to a projected corporation, the public officers who made the grant had sought to impose restrictions which would seem unlawful, either because they required the performance of a forbidden act, or because they transcend the scope of the authority of the officers, doubtless such restrictions could not be enforced; and the ques-

tion how far the grant of the location would be deemed valid in such a case is not before us. The general doctrine is that the location would be held to be valid, the attempt to impose an unlawful restriction being a mere nullity."

Murphy v. *Worcester, etc., Ry. Co.* (Mass.), 85 N. E. Rep., 507, 509.

See, also:

In re Kings County Elev. Ry. Co. (N. Y.), 13 N. E. Rep., 18, 22-26.

Aberdeen v. *Honey*, 8 Wash., 251, 254.

Keefe v. *L. & B. St. Ry. Co.* (Mass.), 70 N. E. Rep., 37, 38.

People v. *Coler* (N. Y.), 59 N. E. Rep., 715, 718.

City of So. Pasadena v. *L. A. T. Ry. Co.* (Cal.), 41 Pac. Rep., 1093, 1094.

City of Arcata v. *Green* (Calif.), 106 Pac. Rep., 86, 87-8.

Galveston, &c., Ry. Co. v. *City of Galveston* (Texas), 39 S. W. Rep., 96, 100, *et seq.*

City of Kenosha v. *K. H. T. Co.* (Wis.), 135 N. W. Rep., 849.

Assuming for the purposes of this argument that the Act of March 3, 1899, authorized the Secretary of the Interior to make a grant of a right of way for railway purposes by filing and approving surveys and plats thereof across forest reservations "when, in his judgment, the public interests will not be injuriously affected thereby"; and assuming further, as held by the Court of Appeals, that under the provisions of this act and of the Act of June 4, 1897, the Secretary is vested with jurisdiction to prescribe rules and regulations for the purpose of protecting the reservation from injury by railway construction therein, and with jurisdiction to require the corporation seeking such right of way to enter into stipulations or agreements for the purpose of protecting the forest, as a condition precedent to his approval of the surveys

and plats of location, nevertheless, the power thus conferred would not extend beyond such requirements as were reasonably necessary for the protection of the reserve.

The stipulation demanded by the Government and that embodied in the decree of the court, go beyond this. The provisions of Clause 2 of the stipulation, requiring payment for the timber cut for the purpose of clearing the right of way and the additional strips required to be cleared by the Government, have no tendency to protect the forest. They are revenue regulations, pure and simple, devised for the purpose of securing money for the timber cut. This requirement is not only in conflict with the spirit of the Act of March 3, 1875, which grants the privilege of taking material of earth, stone and timber for construction purposes, free, but it is also in direct conflict with the provisions contained in the Act of June 4, 1897, which, as we have heretofore pointed out, authorized the sale of timber within the reservations for limited purposes only, and only under restricted conditions which the stipulation ignores.

The demanded stipulation and the one which the court has ordered the appellant to execute, are, therefore, illegal to the extent that they provide for a sale of the timber by the Government to the Railway Company.

For this reason also the inclusion in the decree of $26,989 for timber cut, is erroneous.

(2) *The case is equally without equity when considered from the standpoint of injunctive relief.*

(a) We have heretofore noted that the bill is not primarily for injunctive relief but for specific performance only, and that the injunctive relief is sought only as a means of enforcing the demand for specific performance; and this being so, if the case fails as one for specific performance, it cannot be sustained as a case for injunction.

(b) Independently, however, of the above, complainant is not entitled to injunctive relief. The bill charges that immediately after May 10, 1907, appellant began the construction of its railway in the reserve; that December 2, 1907, it advised appellee of its contention that it could not be required to sign any stipulation. The bill admits and the evidence establishes that the appellee was at all times advised of the acts of appellant done in its railway construction; that with full knowledge thereof the appellee took no steps until the filing of the bill June 25, 1909. As shown by the telegram of the Forester of December 2, 1907, and the memorandum of the Law Officer of the Forestry Service of the same date (Rec., 226-229), it consented to the construction of the railway waiving expressly all claims for injunctive relief; and maintained that position until the present bill was filed, which was only when the railway was practically completed. That a land owner cannot sit still and see a railway company enter upon his land, proceed with the construction of its railway, doing a large amount of work and expending vast sums of money, and then invoke the aid of a court of equity to enjoin such work, is the uniform holding.

> "It has been frequently held that if a land owner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages."
>
> *Roberts* v. *N. P. R. R.*, 158 U. S., 1, 11.

And see:

1 High on Injunctions (4th ed.), Sec. 618, 643.

Osborne & Co. v. *M. P. Ry. Co.*, 37 Fed. Rep., 830.

Pettibone v. *L. C. & M. R. Co.*, 14 Wis., 440.

I. B. & W. Ry. Co. v. *Allen* (Ind.), 15 N. E. Rep., 446.

1 Elliott on Railroads (2nd Ed.), Sec. 628.

N. P. Ry. Co. v. *Murray* (C. C. A)., 87 Fed. Rep., 648, 651.

N. P. Ry. Co. v. *Smith*, 171 U. S., 260, 271.

Stuart v. *U. P. R. Co.* (C. C. A.), 178 Fed. Rep., 753, 757.

In *Osborne & Co.* v. *M. P. Ry. Co., supra*, the bill of complaint was filed in February, 1887, and the railway track was not laid until March 20, 1887. There was, however, no application for an injunction *pendente lite* and the case was not brought on for final hearing until January 31, 1889, or a little less than two years. The court held that the delay in bringing the action on for hearing without asking an injunction *pendente lite*, was fatal to the injunctive relief sought.

And while it is true that time does not run against the United States so as to bar a cause of action, that equitable estoppel will operate to deprive the Government as well as other litigants of the right to peculiar remedies by a court of conscience, has been repeatedly held.

U. S. v. *San Jacinto Tin Co.*, 23 Fed. Rep., 279, 286-7.

U. S. v. *Flint*, No. 15, 121 Fed. Cas.

U. S. v. *White*, 17 Fed. Rep., 561, 565.

And see:

Mountain Copper Co. v. *U. S.* (C. C. A.), 142 Fed. Rep., 625, 629.

U. S. v. *Grand Rapids, etc., Co.*, 154 Fed. Rep., 131, 136.

C. & D. Canal Co. v. *U. S.* (C. C. A.), 223 Fed. Rep., 926, 929-30.

It is well said by the trial judge in his opinion, "As

a suitor its (the Government's) status is substantially that of a private litigant" (Rec., 166); and being such, it is bound by the ordinary rules governing litigants in courts of equity.

(c) Appellant was in possession of the right of way where its road was being constructed, claiming title thereto under the provisions of the Act of March 3, 1875, with full right to take material of earth, stone and timber from lands adjacent thereto for purposes of construction. It was in such possession under claim of right. The injunctive relief, so far as it related to the improvement, use and continued occupation of the right of way, contemplated the ouster of appellant from this possession, and the purpose of the bill being to secure the ejection of the appellant, it was, to this extent, in excess of the equity jurisdiction.

1 High on Injunctions (4th ed.), Sec. 629-30, 674, 718.

Buchanan Co. v. *Adkins* (C. C. A.), 175 Fed. Rep., 692, 698.

Le Roy v. *Wright*, No. 8, 273 Fed. Cas.

C. M. & P. S. Ry. Co. v. *Farrell*, 20 Ida., 680, 686.

So far as the bill sought to obtain an injunction against the cutting or removing of timber from the right of way upon the theory that appellant was committing waste is concerned, it is sufficient to say that such relief, if granted at all, could only be granted in aid of an action at law to recover possession and for the purpose of maintaining the property *in statu quo* pending the determination as to the legal right of the appellant. No such action having been brought, the respondent is not entitled to injunctive relief upon this ground.

Buchanan Co. v. *Adkins* (C. C. A.), 175 Fed. Rep., 692, 698.

Le Roy v. *Wright*, No. 8, 273 Fed. Cas.

(d) As to the cutting of timber outside of the right of way it will be noted: (1) That the bill contains no allegation that such timber was being cut for purposes other than the construction of the railway; and if appellant was, as it contends, entitled to the benefit of the Act of March 3, 1875, such cutting would be within its legal rights; (2) that the cutting of the extra widths was pursuant to the demands of the respondent. See:

Par. 1 of Exhibit G attached to bill (Rec., 45).
Letter of March 9, 1908 (Rec., 235).
Letter of April 27, 1908 (Rec., 237).
Letter of May 15, 1908 (Rec., 238).
Letter of July 10, 1908 (Rec., 239-41).
Letter of July 23, 1908 (Rec., 242).
Letter of July 11, 1908 (Rec., 243).
Letter of August 6, 1908 (Rec., 244).
Letter of August 13, 1908 (Rec., 245).
Testimony of Mr. Skeels (Rec., 254, 275-276).

That under these circumstances the claim of the Government for an order enjoining such cutting was without equity, goes without saying.

For the foregoing reasons we submit that the bill of the complainant was, and is, totally without equity.

Point VI.

The United States Circuit Court of Appeals erred in refusing to hold the bill multifarious.

The bill, as we have heretofore noted, was filed primarily to secure the specific performance of the promise contained in the Peck agreement of May 10, 1907. There was united in this bill with the claim for specific performance, the three distinct causes of action discussed in Points II, III and IV, viz: (Point II) claim on account of an alleged public nuisance, which was in nowise connected with the claim that the appellant should execute the demanded stipulation, since such stipulation contained no reference to injuries of this nature; (Point

III) a claim for damages pure and simple based upon an alleged tortious burning of timber; and (Point IV) a claim on account of timber cut. The claims asserted for stream obstructions and the burning of timber are based upon alleged torts. Whether the claim for timber cut is to be deemed a claim for damages for an alleged wrongful cutting, that is, a tort, or whether it is to be deemed, as the trial court treated it in determining the cause, as a contract obligation growing out of the alleged promise by Mr. Peck on behalf of the company to execute a stipulation similar to the Helena National Forest stipulation, where there is embodied an agreement to pay $3 per thousand for timber cut, is not clear. These three claims, two based entirely upon torts, the third on either a tort or contract, are united in this bill with the claim for specific performance, which is purely and simply a claim based upon a contract. The bill also, in so far as it asks an award of damages in conjunction with the prayer for specific performance and the alternative prayer for injunctive relief, united claims of purely equitable cognizance with those which are purely legal in their character. This combination of claims sounding in tort with those based upon contracts, of claims of equitable cognizance with those purely legal in character, is not permissible and renders the bill multifarious.

A bill for equitable relief with which is coupled a demand for personal judgment on purely legal claims, is multifarious.

> *Hudson et al.* v. *Wood et al.*, 119 Fed. Rep., 764, 777-8.
>
> 23*rd St. Ry. Co.* v. *M. S. Ry. Co.*, 177 Fed. Rep., 477, 479.

And a bill to recover for two independent disconnected and unrelated matters, is multifarious and cannot be sustained.

> *Norton* v. *Colusa, etc., Co.*, 167 Fed. Rep., 202, 206.

Inman v. *N. Y. I. W. Co.*, 131 Fed. Rep., 997, 999.
Mesisco v. *Giuliana et al.* (Mass.), 76 N. E. Rep., 907.
Leslie v. *Leslie*, 84 Fed. Rep., 70, 71.
Hutchinson v. *Dennis* (Pa.), 66 Atl. Rep., 524, 525.
Cecil v. *Karnes* (W. Va.), 56 S. E. Rep., 885, 886.

It is true the rule prohibiting multifariousness is to some extent a rule of convenience and considerable latitude is exercised in its application. This discretion upon the part of the court, however, is not arbitrary or unlimited. It is a judicial discretion to be exercised in aid of justice. And we know of no case, and we think none can be found, where such a grotesque combination of matters of legal and equitable cognizance, of matters of tort and contract, as is presented by the bill in this case, has ever been permitted. Not only does it violate the rules based upon experience prohibiting misjoinder of divers causes of action, but its tendency is strongly toward the defeat of justice. We are, in fact, upon this appeal presenting to this court at least four separate and distinct cases. The result is such an accumulation of questions to be presented and argued as to absolutely preclude their fair presentation within the time limited by the rules of court for argument and to require the submission of this case upon a brief of such undue length as must discourage full consideration of the numerous matters which, however, materially affect the decree entered herein. It was this cumulation of questions, resulting from the combination of these different cases, which prevented the trial court from considering objections to testimony and led it to dispose of the case largely upon the determination of a single question which, however important, by no means authorized the entry of the decree such as was in fact entered. This same cumu-

lation of matters undoubtedly prevented the Court of Appeals from noting the clear errors involved in the adoption of the agreed price for timber *cut* as the measure of value of mature timber *burned*, and the use of incompetent evidence in measuring the damages for immature timber burned. This misjoinder of these disconnected claims has been and is unjust and unfair to appellant, and to the courts upon whom the burden of disentangling such mixed issues and determining four cases in one, ought not to be imposed.

We respectfully submit that the bill should be ordered dismissed because of this defect.

Point VII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO HOLD THAT THE DISTRICT COURT WAS WITHOUT JURISDICTION TO AWARD TO APPELLEE ANY MONEY DAMAGES WHATSOEVER.

In connection with Points II, III and IV we have given reasons why the different items of money damage, aggregating $68,489, were erroneously allowed in the decree in this case. We have shown that the claim for stream obstructions has no proper place in this action, and that the claims for timber cut and for timber burned are alike claims of purely legal cognizance which cannot be litigated in a court of chancery.

U. S. v. *Bitter Root Dev. Co.* (C. C. A.), 133 Fed. Rep., 274.

U. S. v. *Bitter Root Dev. Co.*, 200 U. S., 451.

The appellee in the trial court and Court of Appeals, without questioning the legal nature of the claims for damages for timber destroyed, contended that the court of chancery having taken jurisdiction for any purpose would, to avoid multiplicity of actions, retain jurisdiction for all purposes, including the awarding of relief

purely legal in its nature and which, under other circumstances, the chancery court could not grant; the contention was sustained in those courts which have awarded damages for such claims aggregating $68,489. The rule thus contended for is not an accurate statement of the law, especially when applied to courts of the United States and other courts wherein the distinction between actions at law and actions in equity are rigidly maintained. The rule permitting courts of chancery to award money damages is confined to those cases where such damages are incidental to the principal equitable relief and where the complainant has made out a right to such equitable relief, but is prevented from securing same by some fact for which it is not responsible. While some confusion as to the limits of the rule has arisen from decisions of courts in states where by statute the distinction between actions at law and actions in equity has been, as far as possible, abolished, and where in consequence the courts of equity exercise greater latitude, the limitation of the rule above suggested has been too frequently announced by the federal courts and by courts in states where the distinction between legal and equitable procedures obtain, to admit of doubt as to its existence and soundness.

> "It is not true, by any means, that when a court of conscience has acquired cognizance for one purpose, it thereby acquires cognizance over the entire controversy, for all purposes."
>
> *Loder* v. *McGovern* (N. J.), 22 Atl. Rep., 199, 200.
>
> *Norton et al.* v. *Colusa, etc., Co.*, 167 Fed. Rep., 202, 203, *et seq.*, and cases cited.

Article 7 of the Amendments to the Federal Constitution provides:

> "In suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by the jury shall

be otherwise re-examined in any court of the United States than according to the rules of the common law."

Section 2 of Article 3 of the Federal Constitution provides:

"The judicial power shall extend to all cases in law and equity, arising under this constitution," etc.

Section 723 of the United States Revised Statutes (in force when this action was instituted and tried) provided:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

Construing these constitutional and statutory provisions this court has repeatedly held that the right to trial by jury means the right to a jury trial as the same existed at common law; that the equitable jurisdiction vested in the federal courts is the jurisdiction exercised by the English Chancery Courts at the time of the adoption of the constitution; and that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

Scott v. *Neely*, 140 U. S., 106, 110.
Root v. *Ry. Co.*, 105 U. S., 189, 212, *et seq.*
Hipp et al. v. *Babin et al.*, 19 How., 271, 278.
Buzard v. *Houston*, 119 U. S., 347, 351.
Thompson v. *R. R. Co.*, 6 Wall., 134, 137.

See also:

Amer. Waterworks, etc., Co. v. *Home Water Co.*, 115 Fed. Rep., 171, 181.
Oconto City Waterworks Co. v. *City* (Wis.), 80 N. W. Rep., 1113, 1117.
Smith v. *Bourbon Co.*, 127 U. S., 105, 112.

Stating the rule with reference to the recovery of damages in an action in equity your Honors said:

> "The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice."
>
> *Dowell* v. *Mitchell,* 105 U. S., 430, 432.

See also:

Buzard v. *Houston,* 119 U. S., 347, 351.

Kramer v. *Cohen,* 119 U. S., 355.

Kessler v. *Ensley Co.,* 123 Fed. Rep., 546, 567.

Alger v. *Anderson,* 92 Fed. Rep., 696, and cases cited.

Lewis Pub. Co. v. *Wyman,* 168 Fed. Rep., 756, 761-2, and cases cited.

S. C. (C. C. A.), 182 Fed. Rep., 13; 228 U. S., 610.

Munday v. *Shellabarger* (C. C. A.), 161 Fed. Rep., 503.

Clark v. *West,* 122 N. Y. Sup., 380, 390, affirmed, 95 N. E. Rep., 1126.

Patterson v. *Patterson* (Ill.), 95 N. E. Rep., 1051, 1063.

Davis v. *City of Silverton* (Ore.), 82 Pac. Rep., 16, 19.

Applying these principles to the case at bar, it is evident that the claims for strictly legal relief by way of damages for the timber cut or burned are not within the jurisdiction of the court, save as they may be incidental to matters of strictly equitable cognizance which had been pleaded and made out in the case. The equitable jurisdiction in this cause was invoked primarily for the specific performance of an alleged contract. We have shown that the claim to equitable jurisdiction upon this ground is unfounded and insufficient to support a de-

cree thereon. The only other ground of application to the court of chancery was for injunctive relief and this also, as shown, has failed. This being so, the court could not retain the bill for the purpose of assessing monetary damages for timber destroyed, but should have dismissed the case.

Point VIII.

THE UNITED STATES CIRCUIT COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE DECREE ENTERED HEREIN WITH RESPECT TO THE APPROVAL OF THE MAPS OF LOCATION WAS INCONSISTENT WITH ANY RIGHT OF RECOVERY BY APPELLEE FOR TIMBER CUT FROM THE RIGHT OF WAY SUBSEQUENT TO MAY 10, 1907.

The decree entered by the trial court and affirmed by the Court of Appeals, provides:

> "That within thirty (30) days from the date hereof the defendant shall deliver into this court the duplicate maps of its definite location through the Coeur d'Alene Forest Reserve, * * * heretofore filed in said Coeur d'Alene United States Land Office May 10, 1907, or a duplicate thereof; and shall also within said time execute and deliver into court the following stipulation: * * *
>
> Such stipulation to be delivered to the plaintiff by the court upon the approval by the Secretary of the Interior of said maps, *such approval to relate back to May* 10, 1907." (Rec., 169, 174.)

The stipulation embodied in this decree contains the following provision:

> "This stipulation shall be deemed to have been executed on May 10, 1907, *and shall have the same force and effect, so far as practicable, as if it had been executed on the said date.*" (Rec., 173.)

The stipulation and approval of the maps are thus, by the express terms of the decree, to relate back to, and take effect as of, May 10, 1907. And whatever rights the Railway Company can acquire by the filing and approval

of these documents, it must be deemed to have held since that date. That these rights include a right of way 200 feet in width, under the Acts of March 3, 1875, and March 3, 1899, is clear. The stipulation required by the decree opens with the following recital:

> "Whereas, a part of the railroad right of way of the Chicago, Milwaukee & St. Paul Railway Company of Idaho (hereinafter designated as 'the Company'), as shown by a certain map of location filed by the Company in the Department of the Interior on May 10, 1907, under the Acts of March 5, 1875, and March 3, 1899 (said right of way being two hundred (200) feet in width), is located within the Coeur d'Alene National Forest * * *."

That the right of way granted by the Act of March 3, 1875, is more than a mere easement, is settled. Speaking of this right of way, this court recently held:

> "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the Company ceases to use or retain the land for purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."
>
> *Rio Grande Ry.* v. *Stringham*, 239 U. S., 44, 47.

We have seen that the Act of March 3, 1899, if it makes any grant, does so solely by reference to the Act of March 3, 1875, and even if the grant is limited, as was suggested by the trial court, "to what may be strictly called the right of way features of the Act of 1875," it still included the two hundred feet right of way, with all that a right of way under the Act of 1875 implied. *The timber standing on, and constituting a part of, the right of way, necessarily passed by the grant. And as, by the express provisions of the decree, the title to this right of way is to take effect as of May* 10, 1907, *every piece of timber cut by appellant thereon, subsequent to that date, was its own property. And it is a conceded fact that*

all of the timber cut upon the right of way was cut after that date.

It will undoubtedly be insisted that, by the terms of the stipulation, the right to the grant was conditioned upon payment for the timber, or, in other words, that the soil as distinguished from the timber was granted, but, upon condition that appellant purchase and pay for the timber thereon; but this is in direct conflict with the provisions of the acts granting the right of way.

Neither is there any law anywhere to be found, vesting the department with authority to make such a bargain. We have seen that the forest reserve laws expressly prohibit a sale of timber in such manner. The Act of March 3, 1899, even if it authorizes the Secretary to prescribe rules and regulations for the protection of the forest as a condition precedent to approving maps of the right of way, does not authorize, or purport to authorize, that official to sell timber or to require payment therefor as a condition precedent to his approval. It does not authorize the Executive to limit the grant of right of way by excluding the timber therefrom any more than it authorizes him to limit it by excluding a portion of the width, restricting it to fifty or one hundred feet. Such a limitation, indeed, would be more reasonable, for a railway might be constructed on a fifty or one hundred feet right of way, but it cannot be constructed without clearing the right of way in part, at least, and removing the timber therefrom.

There is thus no authority in the Executive to make this limited and restricted grant. The only grants which the Executive can make operative by approval, are those authorized by Congress. And there is no more power in that Department to authorize or approve a grant of less than Congress has prescribed, than of more than is authorized. This provision of the decree and of the stipula-

tion ignores the limited powers of the Secretary; and assumes a power in that officer of disposal of public lands, which is without warrant in law.

We submit, therefore, that even if the law is as announced in the opinion of the trial court, or of the Court of Appeals, the decree entered cannot stand, for it is inconsistent therewith, and in its own provisions.

Conclusion.

If appellant was entitled to the benefits of the Act of March 3, 1875, this suit must be dismissed. There would exist no consideration whatsoever to support the Peck agreement, and even if otherwise unobjectionable, it would remain a mere *nudum pactum*. And if no right of way were secured under that act, but one is authorized and secured by the approval of the map as required by the decree, and under the Act of 1899, the obligation to pay for the timber thereon is, for reasons pointed out, void as being in excess of the power of the Executive to demand or accept; and the stipulation is, to that extent, a nullity, and one which a court of equity should not require to be executed. If, on the other hand, neither the Act of 1875 nor of 1899 grants or authorizes a right of way in the reserve, appellant was, and is, a trespasser; and there was no authority to sanction its presence therein, or to permit the construction of its road, and the Peck agreement and the stipulation are alike illegal. The case for specific performance, therefore, fails in any event. It equally fails as an action for an injunction against cutting timber on the right of way, whether appellant is the owner of the right of way, under the Act of 1875, or under the Act of 1899, or the decree of the court. It further fails as an injunction suit, because all of the timber, whether on or off the right of way, was cut with the knowledge and acquiescence of the Government, that cut

off of the right of way being cut under the direct demands of the Government, and for its benefit; and all cutting having been completed before the action was commenced. The equitable causes of action being without merit, there remained no jurisdiction in the court to hear, determine, or enter judgment on, the legal claims.

We respectfully submit that the decree entered herein should be set aside, and the cause remanded with directions to enter a decree dismissing this suit.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO, Appellant,
v.
THE UNITED STATES.
No. 176.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

PRELIMINARY STATEMENT.

The appeal of the Chicago, Milwaukee and St. Paul Railway Company of Idaho brings up for review a decree of the Circuit Court of Appeals for the Ninth Circuit, dated November 2, 1914 (R. 592), which affirmed a decree of the District Court for the district of Idaho, northern division, dated June 11, 1913, requiring the company to execute and file a stipulation defining its rights and obligations in the construction and operation of its railroad across the Coeur d'Alene Forest Reserve in Idaho, to be delivered to the United States upon approval of the company's maps of location by the Secretary of the Interior, and also awarding damages in the sum of $68,489.00 (R. 169–174).

Opinion, District Court (R. 136), 207 Fed. 164.

Opinion, Circuit Court of Appeals (R. 563), 218 Fed. 288.

In opposition to the numerous propositions advanced by counsel for the company in support of its various assignments of error we deem it sufficient to interpose the following counter propositions:

1. The company did not secure the benefits of the general right-of-way act of March 3, 1875 (18 Stat. 482), prior to the reservation of the lands in question for forestry purposes.
2. After the reservation for forestry purposes no right of way across the reserved lands could be secured except upon compliance with the forestry laws and regulations.
3. The forestry laws and regulations required the company, as a condition precedent to the acquisition of its right of way, to execute and file the stipulation prescribed for the protection of the reserve.
4. The company evaded the execution of the required stipulation and constructed its road across the reservation in defiance of the forestry laws and regulations.
5. The court had jurisdiction in equity to grant the relief prayed for in the bill.
6. The decree, although imperfect in form, is not defective in substance.
7. The amount of damages awarded is correct.

The matters of law and fact necessary to the consideration of each of these propositions will be presented in the argument.

ARGUMENT.

I.

The company did not secure the benefits of the general right-of-way act of March 3, 1875 (18 Stat. 482), prior to the reservation of the lands in question for forestry purposes.

Counsel for the company rely upon section 1 of the act of 1875, which reads as follows (18 Stat. 482):

> That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side tracks, turn-outs and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

On February 17, 1906, the company filed its articles of incorporation and proof of organization with the Secretary of the Interior (R. 188). Previously, on March 21, 1905, by direction of the Secretary of the

Interior, pursuant to a recommendation of the Secretary of Agriculture, the Commissioner of the General Land Office temporarily withdrew the lands in question "from all disposal, except under the mineral laws," pending the creation of a proposed forest reserve (R. 185, 247).

It is first contended that, because the right-of-way grant of 1875 was *in praesenti*, a location after the withdrawal took effect by relation as of the date of that act. Although the grant was expressed in the present tense, it could not operate presently without a present grantee, and the indication of a future grantee signified the intention that it should take effect in the future and not presently. *Hall* v. *Russell*, 101 U. S. 503, 509. It could not therefore take effect in this instance prior to the company's qualification as a grantee (*Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, 130), which was February 17, 1906, eleven months after the withdrawal.

Claiming then as of February 17, 1906, it is contended that the withdrawal of March 21, 1905, was ineffectual because it was made without authority of law. The act of March 3, 1891, §24 (26 Stat. 1095, 1103), authorized the President to "set apart and reserve" public lands for forest reservations. The power to establish permanent reservations includes the power to make temporary withdrawals. The Commissioner's order, by direction of the Secretary, must be regarded as the act of the President. And such executive disposition by authority of Congress

was a disposition by Congress. *United States* v. *Morrison*, 240 U. S. 192, 212; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 476; *Wolsey* v. *Chapman*, 101 U. S. 755, 770; *Wilcox* v. *Jackson*, 13 Pet. 498, 513.

But independently of the temporary withdrawal, the company was excluded by the permanent reservation established by proclamation of the President on November 6, 1906 (R. 196; 34 Stat. 3256).

Section 4 of the right-of-way act of 1875 reads as follows (18 Stat. 483):

> That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The company's map of definite location across the reservation was not filed until May 10, 1907 (R. 203), six months after the President's proclamation. Two

other maps showing different locations were filed, one October 23, 1906 (R. 192), and another March 20, 1907 (R. 198); but these appear to have been tentative only, were superseded by the map of May 10, 1907, and were therefore returned to the company (R. 209). They were received by the company without objection and were never refiled. Actual construction of the road across the reserved lands was not commenced until July, 1907 (R. 234), eight months after the reservation was established.

It is contended that this location subsequent to the reservation gave effect to the grant of 1875, by relation, as of February 17, 1906, the date of appellant's qualification as a grantee. Assuming for the moment that the doctrine of relation applies to the case of an intervening forest reservation (which it does not), it yet possesses no such scope as that asserted by counsel. The grant of 1875, although expressed in the present tense (§1), is of a right of way to be selected, in advance of actual construction of the road, by filing and approval of a map of definite location (§4). And so it has repeatedly been held that the grant does not take effect to cut off rival claimants until the filing of a map of definite location, or until the actual construction of the road in the absence of such a map. *United States* v. *Denver &c. Ry.*, 150 U. S. 1, 8; *Jamestown & Northern R. R.* v. *Jones*, 177 U. S. 125, 131; *Minneapolis, St. Paul &c. Ry.* v. *Doughty*, 208 U. S. 251, 255–257; *Stalker* v. *Oregon Short Line*, 225 U. S. 142, 149–150; *Barlow* v. *Northern Pac. Ry.*, 240 U. S. 484–486.

However, this doctrine of relation was contrived solely for the determination of the rights of rival claimants to public land, and to give effect to the principle that the first in time should be deemed to be the first in right. It never has been, and in its nature can not be, applied in favor of a claimant against the United States. Nothing short of full compliance with every condition prescribed by Congress for the acquisition of title to public lands will suffice to cut off the power of Congress to make other disposition of the lands. *The Yosemite Valley Case*, 15 Wall. 77, 86; *Shepley* v. *Cowan*, 91 U. S. 330, 338; *Campbell* v. *Wade*, 132 U. S. 34, 37; *Russian-American Co.* v. *United States*, 199 U. S. 570, 577–578; *United States* v. *Morrison*, 240 U. S. 192, 212. Hence approval by the Secretary of the Interior of a map of definite location, as required by section 4 of the act of 1875, is an essential prerequisite to the acquisition of a right of way under that act as against the United States. *Stalker* v. *Oregon Short Line*, 225 U. S. 142, 148–151. The company's map of definite location in the case at bar, filed long after the creation of the forest reservation, never was approved because of its failure to comply with the regulations made pursuant to law for the protection of the forest (R. 233–234).

II.

After the reservation for forestry purposes no right of way across the reserved lands could be secured except upon compliance with the forestry laws and regulations.

Section 5 of the general right-of-way act of 1875 provides (18 Stat. 483):

> That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale.

Lands reserved for forestry purposes certainly are "lands specially reserved from sale" and were therefore excepted from the operation of the right-of-way act by its plain language. The rule of *ejusdem generis* presents no difficulty. It may be admitted that the reservation referred to by the words "lands specially reserved from sale" must be of the same general class as a "military, park, or Indian reservation," in order to fall within the terms of the exception. Yet it is difficult to imagine a class of reservations embracing those created for military, park or Indian purposes which would exclude those created for forestry purposes. The enumerated reservations possess no common attribute which does not also belong to forest reservations. The one common characteristic of them all is that they embrace "lands specially reserved from sale," and this is also common to all reservations of public lands. Any rule which would exclude forest reservations would equally exclude every other kind of reservation except those

enumerated, and thus would restrict these general words so as to deprive them of all meaning. The rule of *ejusdem generis* can not be carried to such an excess. Like all other rules of interpretation it is designed to aid in ascertaining the meaning of the words used in case of doubt. It can not be employed to control the intention of the lawmaker where there is no doubt. In that case the rule would defeat its own purpose. 2 *Lewis' Sutherland Stat. Const.* (2 ed.), §437; *Caminetti* v. *United States*, decided by this court January 15, 1917.

The circumstance that forest reservations may not have been specifically in the legislative mind in 1875 proves only the wisdom of the general provision excepting from the future operation of the grant any lands that might be thereafter specially reserved from sale. For what purposes reservations might become necessary could not be foreseen; but it must have been considered that the purpose of any character of reservation might be defeated by an absolute right to construct a railroad across it and take timber from it free from all regulation. This is especially true of a forest reservation. The right conferred by section 1 of the act of 1875 to take timber from adjacent public lands for construction of a railroad and its appurtenant buildings is not limited to construction contiguous to the lands from which the timber is taken, but extends to any portion of the line. *United States* v. *Denver &c. Ry.*, 150 U. S. 1, 11. The area of adjacent lands from which timber may be taken is uncertain—perhaps not more than two, perhaps as

much as twenty, miles, according to the circumstances. *United States* v. *St. Anthony R. R.*, 192 U. S. 524, 539–540. Clearly the absolute right asserted by the appellant would be destructive of forest reservations, and of this the destruction wrought in the case at bar furnishes abundant illustration. The general exception in the act of 1875 of "lands specially reserved from sale" must have been inserted for some useful purpose. If it does not serve to exclude the right here asserted for the appellant company it is manifestly useless.

In all general right-of-way legislation since the adoption of the forest reservation policy in 1891 Congress has invariably classed forest reservations with military, park, and Indian reservations.

The act of March 3, 1891 (26 Stat. 1095), which first authorized the reservation of forest lands (§24, p. 1103), granted rights of way to canal and ditch companies "through the public lands and reservations," with restrictions for the protection of the government's occupation of "any such reservation." (§18, p. 1101).

The act of January 21, 1895, c. 37 (28 Stat. 635), authorized the Secretary of the Interior to permit rights of way for tramroads, canals and reservoirs "through the public lands of the United States, not within the limits of any park, *forest*, military or Indian reservation." The same language was used in the amendment of May 11, 1898, c. 292 (30 Stat. 404).

The act of May 14, 1898 (30 Stat. 409, 412), granted rights of way to railroad companies over the public lands in Alaska in substantially the terms of the general act of 1875, excepting "lands within the limits of any military, park, Indian, or other reservation."

The act of February 15, 1901, c. 372 (31 Stat. 790), authorized right-of-way permits for various uses "through the public lands, *forest* and other reservations" with certain restrictions relating to "any *forest*, military, Indian, or other reservation."

The act of March 4, 1911 (36 Stat. 1235, 1253–1254), authorized administrative grants of easements for rights of way for electrical power, telephone and telegraph lines over "the public lands, *national forests*, and reservations," subject to special restrictions relating to "any national park, *national forest*, military, Indian, or any other reservation."

Furthermore Congress has always regarded the act of 1875 as inapplicable to forest reservations. This is manifested by the practice of passing special acts in favor of designated railroad companies expressly making the general act applicable to particular forest reservations under suitable restrictions. (Acts of May 28, 1896, 29 Stat. 190; June 6, 1896, 29 Stat. 253; May 18, 1898, 30 Stat. 418; June 27, 1898, 30 Stat. 493; July 8, 1898, 30 Stat. 729; January 10, 1899, 30 Stat. 783; February 28, 1899, 30 Stat. 910; February 25, 1903, 32 Stat. 907). The significance of these acts can not be dismissed with the suggestion

that they merely conferred privileges already granted by the general act and therefore received but little consideration by Congress. An examination of them discloses that each one contains a clause forbidding the company to cut timber on the reservation outside the limits of the right of way. The right to take timber from lands adjacent to the right of way was a very valuable privilege granted by the act of 1875 and one for which the appellant's counsel most strenuously insist.

But regardless of whether forest reservations are excepted from the operation of the act of 1875 by the general language of section 5, they were excepted by subsequent laws enacted pursuant to section 6 of that act, which provides (18 Stat. 483):

> That congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

The laws providing for the creation and protection of forest reservations, and the departmental regulations made pursuant thereto, are inconsistent with the unrestricted right to construct railroads through them, and must therefore be regarded as superseding such right, if it ever existed under the act of 1875, by virtue of the power reserved in section 6 of that act.

And regardless even of this reserved power, the forestry laws were equivalent to a repeal *pro tanto* of the prior right-of-way act. *Campbell* v. *Wade*, 132 U. S. 34, 38.

III.

The forestry laws and regulations required the company, as a condition precedent to the acquisition of its right of way, to execute and file the stipulation prescribed for the protection of the reserve.

The act of March 3, 1891, §24 (26 Stat. 1095, 1103), authorized the reservation of forest lands by executive proclamation; and the act of June 4, 1897 (30 Stat. 11, 35), declared the purposes of such reservations to be "to improve and protect the forest," to "secure favorable conditions of water flows, and to furnish a continuous supply of timber." This latter act also authorized the Secretary of the Interior to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."

In view of these forestry laws, the act of March 3, 1899 (30 Stat. 1214, 1233), provided:

> That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.

Pursuant to the authority conferred by the act of June 4, 1897 (30 Stat. 11, 35), and on May 11, 1904, the Secretary of the Interior promulgated regulations for the occupancy and use of forest reservations and the preservation of the timber thereon (R. 177;

32 L. D. 481, 483). With special reference to the act of March 3, 1899 (30 Stat. 1214, 1233), authorizing the filing and approval of railroad right-of-way maps, the applicant was required, as a condition precedent, to execute and file a stipulation: not to interfere with proper governmental occupation of the reservation; not to cut timber outside the right of way; to remove no timber unnecessarily within the right of way; to remove all such timber, brush and refuse cuttings for such distance as the Land Office might determine to be essential to protect the forest from fires; to furnish men free of charge for fighting fires, and to give an approved bond running in the terms of the stipulation for payment to the United States of all damages to the public property by reason of such right of way "regardless of the cause or circumstances under which such damage may occur."

The act of February 1, 1905, c. 288 (33 Stat. 628), directed the Secretary of Agriculture to "execute or cause to be executed all laws affecting" forest reservations "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands."

With respect to railroads, this act committed to the Secretary of Agriculture the administration of national forest lands, except that relating to the location of rights of way over them, which was left within the jurisdiction of the Secretary of the Interior. On April 25, 1906, pursuant to an agreement between

the Secretary of the Interior and the Secretary of Agriculture defining their respective powers under this act (33 L. D. 609), the former promulgated an additional regulation as follows (R. 183; 34 L. D. 583):

> Whenever a right of way is located upon a forest or timber-land reserve, the applicant must enter into such stipulation and execute such bond as the Secretary of Agriculture may require for the protection of such reserves.

Under these laws and regulations, the requirement of a stipulation in definite form by the Secretary of Agriculture is a condition precedent to a lawful right of way over a forest reserve, and has the same force and effect as if it had been made by act of Congress. *United States* v. *Grimaud*, 220 U. S. 506, 515; *Light* v. *United States*, 220 U. S. 523, 534.

IV.

The company evaded the execution of the required stipulation and constructed its road across the reservation in defiance of the forestry laws and regulations.

On January 2, 1907, the chief law officer of the forest service of the Department of Agriculture, answering an inquiry from the attorneys of the appellant company, informed them that the Secretary of Agriculture "will be obliged to require a stipulation for the Coeur d'Alene similar to that now being negotiated for the Helena Forest Reserve" (R. 209, 210).

The Helena Forest Reserve stipulation was executed January 18, and approved by the Forester January 24, 1907 (R. 214–218). It was executed by the Chicago, Milwaukee & St. Paul Railway Company of Montana, which, like the appellant company, was a subsidiary of the Chicago, Milwaukee & St. Paul Railway Company. George R. Peck was general counsel of the parent company (R. 371) and represented the subsidiary companies in the capacity of agent and attorney in charge of negotiations with the administrative officers of the Government for rights of way sought by them through the Helena Forest Reserve in Montana and the Coeur d'Alene in Idaho (R. 368–369).

On May 10, 1907, the company filed its final map of definite location (R. 203) and, on the same day, in order to secure immediate permission to begin construction through the reserve in advance of the required stipulation, George R. Peck signed and filed in the Department of Agriculture an agreement that the company would "execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad," "to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest" (R. 210). Thereupon the advance permission asked for was given (R. 211), the Supervisor of the forest was notified by telegram (R. 212), and the company immediately began its construction work through the reserve (R. 22, 288).

On October 24, 1907, there was sent to the supervisor a form of stipulation for execution by the company (R. 219), more onerous in some respects than the Helena stipulation, but the officers of the company on November 15, 1907, refused to sign it, giving as their only reason that they desired to "await the outcome of certain negotiations which were pending at Washington, D. C., with the officers of the Interior Department and of the Department of Agriculture" (R. 225). These "negotiations" consisted of an attempt by Peck and his associate Field to persuade the officers of the Forest Service that the company should not be required to execute the stipulation provided for in the Peck agreement because it had just been discovered by Peck that the company's first preliminary map of location was filed before the President's proclamation establishing the reserve (R. 370–384). Failing in this (R. 432–435), Peck stated to the officers of the Forest Service on December 2, 1907, that he was authorized only to execute a stipulation like that made by the company for its right of way through the Yakima National Forest (less onerous than the Helena Forest stipulation, R. 227–229, 438–439, 458), and requested some assurance that the company would not be disturbed in its construction pending a proposed compromise of the matter (R. 225–226). This assurance was given and the Forest Supervisor was again notified by telegram (R. 226).

Further negotiations continued during several months, but without result (R. 235–247, 437–444).

On March 17, 1908, the company made plain its refusal to sign any stipulation, claiming its right of way under the act of 1875, unaffected by the forest reserve, and exempt from any obligation even to clear the right of way (R. 236). Consequently, on August 14, 1908, the Secretary of the Interior, on the request of the Secretary of Agriculture, notified the company that its map of location would not be approved until the stipulation required by the Department of Agriculture had been executed (R. 229–230); and again, on October 10, 1908, that unless the required stipulation were filed within fifteen days its application for a right of way would be rejected and its map would be stricken from the files of the Department (R. 231). Accordingly, on October 29, 1908, the required stipulation not having been filed, the company's application was rejected and its map was stricken from the files and returned to the company with notice of the action taken (R. 233–234). On June 25, 1909, this suit was instituted (R. 1). The railroad was completed July 31, 1909 (R. 234).

The astonishing assertion is made that these facts show permission by the Government officials for the construction of the company's road across the forest reserve without any stipulation. They show, on the contrary, that those officials required of the company a stipulation in definite form before the construction was begun; that this requirement never was withdrawn or gainsaid; that the company, by a sham agreement and a succession of shallow pretentions, gained

the forbearance of certain officials of the Forest Service to the extent of interposing no physical obstacle to its progress through the reserve; and that when the real purpose of the company's "negotiations" was revealed, its application for a right of way was rejected, its map of location was stricken from the files and this suit was brought to enforce compliance with the law and to obtain redress.

Furthermore, the only officer who had authority to grant permission to construct a railroad through the reserve was the Secretary of the Interior, and by him such permission was expressly refused. This refusal was the result of the company's defiance of the regulations made pursuant to law and for the law's enforcement. No consent or acquiescence of any other official could bind the Government or afford the company any refuge. *Pine River Logging Co. v. United States*, 186 U. S. 279, 291.

V.

The court had jurisdiction in equity to grant the relief prayed for in the bill.

After setting out the facts which have been mentioned, the bill prayed that the company be compelled to execute and file the stipulation required by the Secretary of Agriculture, that it be enjoined from occupying the reserve until it shall have executed and filed the required stipulation and until its map of location shall have been approved by the Secretary of the Interior, and that the plaintiff be awarded damages and general relief (R. 35–36).

Failure of the company to execute the required stipulation, without which its map of location could not be approved, places it in the position of an ordinary trespasser on the property of the United States, and unless it shall comply with the law and lawful regulations in this respect its continued occupation of the national property will be a continuing trespass and a permanent menace. Jurisdiction in equity at the suit of the United States to enforce compliance with the law and award incidental compensation for injuries already suffered through noncompliance in such a case is too plain for discussion. *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 564–567; *In re Debs*, 158 U. S. 564, 582–589; *Camp* v. *Boyd*, 229 U. S. 530, 552.

The prayer for damages in general terms and for general relief was sufficient to enable the court to award damages for the injuries alleged in the bill and shown by the evidence. *McGowan* v. *Parish*, 237 U. S. 285, 297.

The Peck agreement to execute the required stipulation, which the company repudiated, and about which so much is said in the brief of opposing counsel, is of small consequence, except as explaining the accommodating forbearance of the Forest Service officials. The issue in this case is not whether the company executed an enforceable agreement to comply with the law, but whether it did in fact comply with the law. Hence the questions raised, accompanied by an affluence of citation, as to Peck's authority, his alleged mistake,

the consideration for his agreement, its mutuality, certainty and ratification, are without any real significance.

The law, operating through authorized administrative action, required for the protection of the forest reserve the execution of a stipulation by the company in definite form. The circumstance that Peck, with apparent authority, agreed that the company would execute the very stipulation so required, thereby enabling the company to occupy the forest reserve without any stipulation, tended to confuse the courts below and induced them to regard the bill of the United States as one for specific performance of Peck's agreement. But the bill is properly founded upon the requirements of the law, involving the property rights and governmental functions of the United States, and should be so regarded.

VI.

The decree, although imperfect in form, is not defective in substance.

The stipulation required by the decree to be executed (R. 169) is identical with that which the bill (R. 19, 21, 38) and the evidence (R. 209, 210, 214) show to have been required by the Secretary of Agriculture, under lawful regulations as a prerequisite to the acquisition of this right of way (*supra*, pp. 13, 15).

Perfection of form would suggest that the decree should have restrained the company from further occupation of the reserve unless within a specified

time it should execute and file the required stipulation. Instead of this the decree directly commands the execution and filing of the stipulation within thirty days, but without awarding the alternative injunction. The only difference in result is that, if the company should disobey the decree, further compulsory proceedings would be necessary to make it effectual. In order to avoid such necessity we suggest the propriety of a direction from this court that the decree be amended by adding a clause to the effect that upon failure to execute and file the required stipulation the injunction will issue as prayed for. *New York City* v. *Pine*, 185 U. S. 93, 104, 108.

VII.

The amount of damages awarded is correct.

The court awarded damages in the sum of $68,489, composed of the following items: For timber cut on and adjacent to the right of way, $26,989; for timber destroyed by fire, merchantable timber, $12,000, seedlings, $24,000; and for obstruction of streams, $5,500 (R. 168).

Damages were awarded in accordance with the provisions of the stipulation which the company was required to execute and should have executed before it entered upon the forest reserve (R. 168). No other measure of damages could have been adopted without treating the company as a trespasser and peremptorily enjoining the operation of the railroad. Rightful operation of the railroad depended upon lawful

acquisition of the right of way, and this presupposed the subjection of the company to the terms of the stipulation.

After reciting the laws and regulations requiring it, the stipulation bound the company (R. 170): to clear and keep clear of all inflammable substance the right of way and a strip 250 feet wide on either side, except such as the Forester might specifically designate in writing; to dispose of all brush and other refuse as required by the forest officer in charge; to cut all trees when physically possible so that they will fall entirely within the strip to be cleared, and so far as practicable to pile no timber or wood less than 100 feet from the edge of the forest reserve (clause 1); to pay to the United States, at $1.00 per cord for wood and $3.00 per thousand feet board measure for usable or merchantable timber, for all wood and timber cut on the right of way and the cleared strips which the company might desire to use or sell, otherwise to leave it compactly piled with all limbs removed for disposal by the Forest Service; to transport such timber and wood, if sold by the Forester, at established freight rates (clause 2); to put in a side track sufficient to handle timber and wood sold from the forest (clause 3); to construct and maintain free of charge crossings for existing roads and trails intersected by the railroad (clause 4); to observe such reasonable precautions against fire as the forester may prescribe; at all times to exercise the utmost care to prevent fires, and "promptly and without

charge give all reasonably possible assistance in men and material, under the direction of the forest officer in charge, to fight fire within said National Forest adjacent to said right of way" (clause 5); to pay to the United States "for any and all damage caused by fires, or otherwise sustained by the United States by reason of the use and occupation of said National Forest by the company, its successors and assigns" (clause 6); and to "make any assignment or transfer of this right of way through the said National Forest expressly subject to the fulfillment of all the conditions herein contained, by the assignee or transferee" (clause 7).

In view of the concurrent findings of both the lower courts, extended consideration of the evidence is unnecessary. It is incumbent upon our adversaries to show that any finding to which they object is clearly erroneous. *Gilson* v. *United States*, 234 U. S. 380, 383, and cases cited.

For timber cut on and adjacent to the right of way.

It is objected that the terms of the stipulation which govern this item are in conflict with the act of June 4, 1897 (30 Stat., 11, 35), as amended by the act of June 6, 1900 (31 Stat. 661), because provision is there made for sales of timber from forest reservations at not less than its appraised value after advertisement, except in cases of unusual emergency. The contention is that this provision excludes authority to charge for timber cut by the company on or in connection with its right of way. The purpose of

this provision is stated in the statute to be for "preserving the living and growing timber and promoting the younger growth." It therefore obviously relates only to those portions of forest reservations which are devoted exclusively to forestry purposes; it could not apply to any portion occupied and used for right-of-way purposes. As to such occupancy and use, another part of the act of 1897 (30 Stat. 35) provides that they shall be governed by the forestry rules and regulations. The power to regulate includes the power to prescribe the terms of such occupancy and use. As the railroad construction necessitated the cutting of timber on the right of way and adjacent strips, there was implied authority to charge the company for such as it might appropriate. The general power to do this by regulation under the act of 1897 is apparently recognized in the act of February 1, 1905 (33 Stat. 628), which provides for the disposition of "all money received from the sale of any products or *the use of any land or resources* of said forest reserves." *United States* v. *Grimaud*, 220 U. S. 506, 521–522.

Concerning the quantity of timber cut, the witness Skeels, an expert timber cruiser in the Forestry Service, testified that he scaled every tree that was cut by the company on the right of way and adjacent strips, and from this data he made accurate estimates and entered the result on maps showing each subdivision of forty acres affected (R. 250–257). These entries were made in nearly every case at the close of

each day's work. Sometimes it might have been two or three days before the data were "worked up" (R. 255). He also testified that Baker, the company's cruiser assigned to accompany him, did so on a part of the cruising, and as to the other part accepted as correct the figures made by the witness (R. 252–253). The estimates were "finally agreed upon" (R. 254). From the maps upon which these estimates were entered the witness compiled a report to his superior (R. 255, 257). The maps were put in evidence as exhibits 2 to 33 inclusive, and the report was introduced as exhibit 34 (R. 257). The report is printed in the record (R. 460–487). Of the maps only exhibit 2 has been printed in an addition to the record (Add. R. 5), but there is a stipulation of counsel that this exhibit is similar in form and character to exhibits 3 to 33, and "that the notations and data on said exhibits Nos. 2 to 33 are correctly reproduced and summarized in tabular form in the tables forming part of plaintiff's exhibit No. 34, already printed" (Add. R. 1). All of this timber was appropriated by the company and either used in its construction work, wasted, or sold (R. 268–269, 286, 390).

The quantity of timber thus shown to have been cut and appropriated was 8,993,580 feet board measure (R. 487). At $3 per thousand feet, the price fixed in the stipulation (R. 172), its value was $26,980.74. The amount awarded on account of this item was $26,989.00 (R. 168).

For timber destroyed by fire.

The bill charged the destruction upon specifically described lands of the United States by fires set and caused by the company "through lack of proper precaution against fire," 4,045,700 feet board measure of merchantable timber, and 1,344½ acres of seedlings (R. 29–32). These amounts were shown to be correct by competent and undisputed testimony. The burned areas were cruised jointly by Seery and Baker, representing respectively the Government and the company, and from the notes made and estimates agreed upon by them four maps were prepared and signed showing the quantities of each class of timber burned on each legal subdivision of forty acres (R. 327–333, 337–338). These maps were introduced as plaintiff's exhibits 36, 37, 38 and 39 (R. 333). From the same data an official report was prepared by Seery which was compared and checked over by Baker and a copy of which was delivered to Day (R. 330), the company's local representative (R. 252, 275). This report was introduced as plaintiff's exhibit 35 (R. 330) and appears in the printed record at the end of the testimony (R. 488–495). Only one of the maps (ex. 37) is printed (Add. R. 6), but it is accompanied by a stipulation that it is similar in character to the other three, and "that the notations and data appearing on the face of these exhibits are correctly reproduced and summarized in tabular form in complainant's exhibit No. 35, already printed" (Add. R. 1).

It was shown that these fires originated on the company's right of way, and were due to lack of precaution against fire and to carelessness in making camp fires and burning brush by the men engaged in the railroad construction work (R. 266, 274, 286, 290, 320–323, 325). It was also shown that the company was warned against these acts of negligence (R. 237, 240, 245).

The quantity of merchantable timber so burned was shown to be 4,045,700 feet board measure (R. 489). At $3 per thousand, the stipulated price for merchantable timber both in this and the Helena Forest stipulation (R. 172, 216), the resulting damage was $12,137.10. The amount awarded by the court on this account was $12,000 (R. 168).

It is insisted that inasmuch as the stipulated price of $3 per thousand was only for timber appropriated by the company, the court should have determined the reasonable market value upon the evidence, and that the case should be remanded for that purpose. It may well be assumed, as both the lower courts assumed, that the reasonable market value was the value agreed upon for timber cut and used. If not, the omission to find such value from the other evidence was favorable to the company, as nearly all of the witnesses who testified on that subject placed the market value at not less than $4 per thousand feet. (R. 258–259, 267–268, 270, 291, 302, 331, 363–364, 416, 419–420, 452–453.) The price specified in practically all of the Government sales

contracts in this locality "for white pine and mixed species was $4 flat rate, or $3 for mixed species and $5 for white pine" (R. 452). Actual sales were being made by the Gov ent at $4 to $5 per thousand for green timb he "St. Joe drainage" where the fires in question occurred (R. 453). The burned area was covered with a growth of the finest white pine, and the estimate of $4 per thousand was considered as very liberal to the company (R. 280, 364). Lower estimates were based very largely upon purchases from settlers, which was not a fair criterion (R. 282–283, 454).

The younger growth of timber on a forest reservation which is too small to be merchantable has no market value; but, like a farmer's growing crop, it possesses actual value. This value is one special to the United States and arises from a settled national policy clearly declared by Congress. Forest reservations are established, among other objects, "to furnish a continuous supply of timber for the use and necessities of citizens of the United States," and, in order to "insure" this object, rules and regulations are prescribed for "the purpose of preserving the living and growing timber and promoting the younger growth" on such reservations (act June 4, 1897, 30 Stat. 11, 35). To accomplish the general objects of forest reservations many millions of dollars are annually appropriated, and specifically for "seeding and tree planting" every annual forest service act

since 1911 has appropriated $165,640 (39 Stat. 461; 38 Stat. 429, 1100; 37 Stat. 287, 842; 36 Stat. 1252).

The general rule that the measure of damages for destruction of immature timber is the difference in market value of the land before and after the destruction, is not susceptible of application to national forest lands, since such lands have no ascertainable market value. In the absence of market value damages for such destruction are necessarily uncertain and difficult of ascertainment; but, as in the case of the farmer's growing crop, this should not prevent a recovery, provided the amount is made as certain as the nature of the case permits. 3 *Sedgwick on Damages* (9th ed.), §937.

The expert foresters who testified for the Government calculated the amount due on this account according to two separate methods: (1) the estimated market value of the immature trees at maturity, minus the cost of caring for such trees from the time of destruction to the age of maturity; and (2) the cost of restocking the burned area with young trees, plus the cost of caring for them up to the average age of the trees when destroyed. These calculations were based upon exact facts and reduced to tables which were introduced as exhibits 1A, 2A, 3A, and 4A (R. 341–368; Add. R. 1, 7–13). This testimony was not contradicted, and no better method for computing this item of damage has been suggested. In view of the concurrent findings of both lower courts we refrain from discussing the testi-

mony at length. We only observe that the total amount as shown by these schedules, according to either method, is more than the amount found by the court.

For obstruction of streams.

The court awarded "$5,500 on account of rock and other debris wrongfully thrown into the St. Joe River and its tributaries" (R. 168). This item accords with a specific allegation of the bill as to the St. Joe River (R. 29), and the testimony shows that the river and its tributaries were treated as one stream, the tributaries being denominated as "forks" of the St. Joe; that they were within the forest reserve, useful in their ordinary condition for three months in the year, and at all times with the aid of splash dams, for driving logs; that they afforded a cheap and easy means of transportation for over two hundred million feet of national forest timber; that the rock and debris thrown into them by the company destroyed their value for logging, whereby the transportation of this timber was rendered much more difficult and expensive (R. 262–265, 272–273, 294, 302, 308). The witness Hamilton made a careful estimate of the cost of removing each of these obstructions, and placed the total cost at $4,100 "to make it a drivable stream during high water only; that would not be the cost of removing all the obstructions" (R. 299). The witness Gregory made a similar estimate of "the only points that I took note of" and placed the total cost at $3,500 for "the

removal of just a sufficient number of rocks to place the stream in a navigable condition." He "did not estimate taking out all the rock" (R. 314). The witness Seery roughly estimated the total "cost to take out the rocks that the railroad company put in there" to be "in the neighborhood of $10,000" (R. 336). Upon this testimony it can hardly be said that the finding of $5,500 was clearly erroneous.

We do not contend that these streams are navigable waters of the United States, nor that their obstruction is a public nuisance. We maintain that as a part of the forest reserve they are the property of the United States, for the obstruction of which to the damage of the United States the law makes the company liable.

The stipulation, without which the company is a trespasser, having been required pursuant to law, has all the force of the law itself. Clause 6 secures payment "for any and all damage . . . sustained by the United States by reason of the use and occupation of the said National Forest by the Company" (R. 173). That this was intended to include damages arising from the obstruction of national forest streams, and as such was fully authorized, results from a consideration of the language of the act of June 4, 1897 (30 Stat. 11, 35), which declares that one of the purposes of forest reservations is to "secure favorable conditions of water flows," and authorizes such rules and regulations "as will insure the objects of such reservations."

CONCLUSION.

The decision of the courts below should be affirmed, with a direction to amend the decree by adding a clause to the effect that unless the required stipulation be executed and filed within thirty days the injunction will issue as prayed for in the bill.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 176

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO,

Appellant,

vs.

THE UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

POINT I.

APPELLANT'S TITLE TO THE RIGHT OF WAY WAS IN NO WISE DEPENDENT UPON THE FILING OF A MAP OF ITS LOCATION, AND THE DATES OF SUCH FILINGS, AND THE APPROVAL OR NONAPPROVAL THEREOF, ARE NOT MATERIAL.

When appellant, by filing its articles of incorporation and proofs of organization with the Secretary of the Interior, accepted the benefits of the Act of March 3, 1875, and identified itself as a grantee under that act on Feb-

ruary 17, 1906, the grant to it became effective as a present grant. It then occupied the same relation to the United States, its title to the right of way was the same, as if on that day Congress had passed a special act making to it, by name, a grant in the same terms as were used in the Act of 1875.

O. S. L. R. Co. v. *Stalker,* 14 Ida., 362; 94 Pac. Rep., 56, 62; affd. 225 U. S., 142.

Dakota Central R. R. Co. v. *Downey,* 8 L. D., 115, 117.

Jamestown & N. R. Co. v. *Jones,* 177 U. S., 125, 130.

The grant would be a vested grant on that date. The specific land granted would not be identified; the grant would remain a float until identification; but when identified in the manner prescribed, the vested title would at once attach as of the date of the grant to the specific grantee, viz: the date of filing the articles and proofs of organization. This being true, the filing of the map is material only in so far as it affects the question of identification, and consequent attachment of the floating grant to a specific strip of land; it cannot affect the vesting of the floating title, for that has already vested.

The identification of the specific strip of land can be made by actual construction, without the necessity of filing any map or invoking the approval in any way (at least subsequent to the acceptance of the articles and proofs of organization) of the departmental officers.

Jamestown & N. R. R. Co. v. *Jones,* 177 U. S., 125, 130, 132.

Barlow v. *N. P. Ry. Co.,* 240 U. S., 484, 487-8.

There is, indeed, doubt whether it can be identified in any other way. The privilege of filing a map in advance of construction *on surveyed lands,* is indeed given

by Section 4 of the Act; and it is provided that upon the approval of such map, all lands over which the right of way shown by the map shall pass, shall be disposed of subject to such right of way. But is this more than a tentative location? If the road, when actually constructed, departs from such map location, the right of way grant as between the United States and the grantee is automatically relocated so as to conform to the constructed road.

Washington & I. R. Co. v. *Coeur d'Alene R. Co.*, 160 U. S., 77, 97.

N. P. Ry. Co. v. *Smith*, 171 U. S., 260, 268.

And although in this case there has been no approval of appellant's maps yet, as there has been actual construction and consequent identification of the strip granted, the failure or refusal of the Secretary to act upon the maps tendered may be disregarded as a material factor in determining whether appellant secured title to its right of way. If there is no other obstacle than the lack of the Secretary's approval of the maps, the title is a vested one.

Point II.

THE TITLE GRANTED ATTACHED TO THE SPECIFIC STRIP OF LAND UPON THE IDENTIFICATION THEREOF, AS OF THE DATE OF THE VESTING OF THE GRANT IN THE GRANTEE, AS AGAINST THE ENTIRE WORLD.

Counsel contend that the title does not vest, as against the United States, so as to cut off the power of Congress to make other disposition of the lands until full compliance with every prescribed condition; that the doctrine of relation, by which counsel assert effect is given to the grant as of a date earlier than the iden-

tification of the granted land, has no application against the government.

This position is founded upon a misapprehension of the nature of a floating present grant. A floating present grant does not attach as of the date of the grant upon the identification of the granted strip or parcel, by virtue of the equitable doctrine of relation. It so attaches because the legislative body, in the exercise of its will, has conveyed to, and vested in, the grantee a present title to the thing granted. The specific land granted is, in float grants, not located or described, but provision is made for its location and identification by acts to be thereafter performed, usually by the grantee. But when these acts are performed, the identified land is then ascertained to have been granted and the title vested in the grantee since the date of the grant. At common law, identification of the thing granted was essential to the vesting of title, but Congress being a legislative body, its grants are laws, as well as conveyances, and as such must be given effect pursuant to the congressional intention, however inconsistent with common law restrictions.

Schulenberg v. *Harriman,* 21 Wall., 44, 62.

And the title to the identified land vests, under these grants, as of the date of its grant, not only against rival claimants but as against the whole world, because of the expression of the legislative will to that effect in the granting act.

There is in all this no question of the equitable doctrine of relation; and cases arising under the settlement laws where grants *in praesenti* are not involved, have no bearing. The cases cited by appellee on page 7 are all of this character. Perhaps no better illustration of the essential difference between such cases and one involving a present grant, as here, could be selected, than

that afforded by *United States* v. *Morrison,* 240 U. S., 192. The land in that case was a part of section 16. Prior to the filing of the approved township plat in the land office, by which act the official survey would have been completed and the sections identified, the land was withdrawn for forest reserve purposes. The claimant, who asserted title under the State of Oregon, contended that there had been an antecedent grant *in praesenti* to the state of all sections numbered 16 or 36, which attached to the specific lands as of the date of the granting act, as fast as they were identified by the survey; and which, therefore, antedated the forest withdrawal. This court ruled against this claim, *but upon the ground that the state grant was not one in praesenti.* And the care taken to show that the grant was not one *in praesenti,* but was one *in futuro,* is eloquent of the opinion of the court that if the state grant had been one *in praesenti,* the title would, upon the identification of the section by survey, have attached as against the United States, as of the date of the granting act, and would have antedated the forest withdrawal. And this case is an almost conclusive ruling against the contention of appellee upon this point.

It is, of course, true that Congress may, in its legislative present grants of lands to be identified in the future, reserve the right to dispose of lands, regardless of the grant, until such time as the granted title attaches by the identification of the thing granted. The land grants made to aid in the construction of railways are examples of such legislation. In such cases, the object in view is usually accomplished by limiting the description of the lands granted to those which are, at the date of filing the identifying map of definite location, not reserved, sold, granted, or otherwise appropriated, and which are free from pre-emption, or other claims

or rights. But such reserved rights exist, not because the grant is not effective as against the government from its date, but solely because of the express reservation in the granting act of such power of disposition. Where it is not so reserved, it does not exist. This is carefully pointed out by this court in *Railroad Company* v. *Baldwin,* 103 U. S., 426, 428. Whether Congress, in the Act of March 3, 1875, did reserve rights, as against one who had become a grantee by filing its articles of incorporation and proofs of organization, to dispose of lands subsequent to the date of the grant to that grantee, so as to exclude them from the operation of the act, must be determined entirely from the terms of the act itself. So far as it reserved such right, it exists; but when there is no reserved right of disposition found in that act, it does *not* exist. We pointed out in our opening brief (p. 71) that the provision of Section 3, for the condemnation of private lands and possessory rights, by implication, reserved the right to permit the attachment of settlers' claims until the identification, either tentative, by filing a map, or absolute by construction, of the strip granted; and gave to those claims superiority over the right of way grant. In conflicts between the rights claimed by such settlers and those claimed by the railway, the question of the date of the vesting of the float title in the railway company is, therefore, not material. In such cases, the question is, *because of the statutory reservation,* solely one as to whether the settler's rights had attached prior to the identification of the specific right of way. The cases cited by counsel (page 6) are all of this nature, but they throw little or no light upon whether there is a right reserved in the act to defeat the vested title of a grantee, by executive reservation of the lands. This question must be answered by the provisions of Section 5 of the Act. Certain classes of

reservations were excluded from the operation of the act; and the power to defeat the grant to the extent of the lands reserved for such purposes, was undoubtedly retained. But this was not a general power, and would not include reservations not of the classes specified in Section 5. As against such nonexcluded reserves, the granted title would remain operative and take priority. That forest reservations are of a nonexcluded class was, we think, abundantly shown in our opening brief.

Point III.

THE GOVERNMENT'S CONSTRUCTION OF SECTION 5 OF THE ACT OF MARCH 3, 1875, AS INCLUSIVE OF FOREST RESERVES, IGNORES THE LANGUAGE OF THE SECTION.

Confronted with the necessity of arguing that forest reserves are included within the classification of "military, park or Indian reservations, or other lands especially reserved from sale," counsel say:

> "It is difficult to imagine a class of reservations embracing those created for military, park or Indian, which would exclude those created for forestry purposes. The enumerated reservations possess no common attribute which does not also belong to forest reservations. The one common characteristic of them all is that they embrace 'lands specially reserved from sale,' *and this is common to all reservations of public lands.*" (Brief, p. 8.)

And again:

> "For what purposes reservations might become necessary could not be foreseen; *but it must have been considered that the purpose of any character of reservation might be defeated by an absolute right to construct a railroad across it and take timber from it free from all regulation.*" (Brief, p. 9.)

The italics in these quotations are ours. This contention involves a construction of Section 5 as excluding

"all reservations of public lands." But such a construction of the statute ignores the phraseology employed by Congress, which clearly shows, as pointed out in our opening brief on pages 73 to 78, inclusive, that Congress did not intend to exclude all reservations. We agree with counsel that it will be impossible to include forest reserves within the provisions of this section, without including all public land reservations, but find in that fact support for our contention that forest reserves are not so included, rather than a justification for a contention which assumes that Congress intended to express a purpose which the language employed tended to contradict.

Point IV.

THE RULES AND REGULATIONS PROMULGATED BY THE EXECUTIVE OFFICERS.

The Government contends, in Point III of its brief, that under the federal laws and executive regulations promulgated in supposed compliance with, and conformity to, such laws, the requirement of a stipulation from the Railway Company is a condition precedent to the acquisition of a lawful right of way over a forest reserve. That executive regulations require the execution of such a stipulation is not denied; but it by no means follows that such a stipulation is a condition precedent to the acquisition of a lawful right of way, or of any right. Unless required, or authorized by statute, so to do, the executive officers are without authority to impose conditions upon the acceptance or enjoyment by the grantees of the grants conferred by Congress. Even when the making of rules and regulations is expressly authorized, such rules and regulations must be consistent with the legislative enactment; and they cannot be made an instrumentality to modify or defeat the legislative will ex-

pressed in the statute, by either enlarging, decreasing or defeating a grant of rights or privileges.

United States v. *United Verde Copper Company*, 196 U. S., 207, is directly in point. The Act of June 3, 1878, authorized the taking of timber for mining, or other domestic purposes, from the public mineral lands, "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth upon such lands, and for other purposes." The Secretary made a rule that no timber should be used for smelting purposes, smelting being a separate and distinct industry from that of mining. The regulation was held invalid. The court said:

> "If Rule 7 is valid, the Secretary has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, not to take it away. The ambiguity arises from the words '*and for other purposes.*' They express a purpose different from the protection of the timber and undergrowth, but they cannot, we repeat, be extended to grant a power to take from the industries designated, whether by the general clause or the specific enumeration, the permission given by Congress."

See also:

United States v. *George*, 228 U. S., 14, 21.
American School, etc., v. *McAnnulty*, 187 U. S., 94, 109.

In determining the effect which should be given to the departmental rules and regulations, it is necessary to consider the legislative enactments. We have seen in our opening brief that the Act of March 3, 1875, made a

present grant of a right of way to railway companies accepting its provisions, over the public lands, including lands within the limits of reservations of the character of forest reserves. By Section 4 of this act the grantees were permitted, if they desired, to make a location of the right of way strip in advance of construction, *so far as such location extended over surveyed lands,* by filing with the land department a plat of the located line and securing the approval thereof by the Secretary of the Interior. This privilege did not, under the terms of the act, extend to unsurveyed lands. (Opening brief, p. 98.) The grantee, however, was not obliged to exercise the privilege. It could *by actual construction* locate the granted strip over both surveyed and unsurveyed public land, and thereby cause the granted title, previously a float, to attach to the right of way so identified. When proceeding in this method, no action by the executive officers in the nature of an approval of the location was required. The grantee was not even required by the statute to furnish the department with a map of its constructed road, or with any information with respect thereto.

By the Act of March 3, 1899, this Act of March 3, 1875, was supplemented and amended by the provision "that in the form provided by existing law, the Secretary of the Interior may file and approve surveys and plats of any right of way for a * * * railroad, * * * over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby." This act contained no words of repeal, and did not purport to deprive any grantee or prospective grantee of any of the rights or privileges conferred by the Act of 1875. Upon the contrary, it purported to enlarge the authority of the Secretary to accept and approve maps filed to locate a right of way

in advance of construction (the only approval which the Act of 1875 contemplated) by permitting him to file and approve such maps of right of way across forest reserves and reservoir sites, whether surveyed or unsurveyed, when in his judgment the public interests will not be injuriously affected thereby.

In neither of these acts is there provision authorizing the promulgation of rules or regulations, nothing suggestive of any congressional purpose to permit the Secretary to limit or modify the grant which Congress itself made. It is true that after the passage of the Act of 1875, the Secretary did issue a circular of instructions, which circular was from time to time reissued and modified. This circular set forth the department's interpretation of the act, prescribed the character of the papers which should be filed to show the corporate character of the applicant, its organization, the form of maps, etc., but was purely advisory in its character, and did not undertake to in anywise impose conditions upon the grant.

The provision of the Act of 1899 authorizing the Secretary to file and approve maps of right of way across forest reserves "when in his judgment the public interests will not be injuriously affected thereby," undoubtedly conferred a discretion upon him. It made it his duty to consider and determine, before accepting and approving such map, whether the public interests would "thereby" be injuriously affected. The effect of such action would be to, *prima facie* at least, vest in the railway company a title to the strip of land so identified—a title which it could retain until forfeited by act of Congress or judicial proceedings pursuant to such act, that is to say, indefinitely, without constructing its railway. It could impede, if not prevent, the construction of other railways desirous of using the same route. A right of way so held would prevent the disposal of the timber

thereon by the government; it might well interfere with the acquisition of necessary easements for canals or ditches under the Act of March 3, 1891 (6 Fed. Stat. Ann., 508); or for generating or distributing electric power under the Act of May 14, 1896 (6 Fed. Stat. Ann., 510-11); or with the easements provided for in the Acts of June 4, 1897 (7 Fed. Stat. Ann., 314), or of May 11, 1898 (6 Fed. Stat. Ann., 512). If upon a consideration of the entire subject, the Secretary deemed that for any of the foregoing or other reasons, the public interest would be injuriously affected by his acceptance and approval of the map tendered, it would be his duty to refuse it. Having such power of refusal, it is probable that the Secretary could make an acceptance and approval conditional upon the removal of, or agreement to remove, any obstacle within the power of the company to remove, which, unremoved, would render the proposed acceptance and filing, with the consequent grant, injurious to the public interest. But if the Company had, as we have shown it had, the legal right to proceed with its construction without filing any map, or securing the approval thereof, the Secretary could not, by refusing to accept or approve the map, unless the grantee agreed to some condition, prevent or limit the acquisition by the grantee of the full benefits of the Act of 1875.

Even if we assume the government's contention, that by virtue of the provisions of Section 5 thereof, the Act of 1875 has no application to lands in forest reserves; that the Act of 1899, although it contains no words of grant, does grant a right of way, upon condition that a map thereof be filed and its approval be secured from the Secretary, and further construe the provision "when in his judgment the public interests will not be injuriously affected thereby," to refer to the effect of the construction and operation of the road, although it in terms

referred to the effect of the filing and approval of the map, and further assume that the Secretary is thereby empowered to make his acceptance and approval of the map conditioned upon the agreement of the grantee to comply with conditions which, in the opinion of the Secretary, would obviate the injurious results that would otherwise follow the construction and operation, still the power to impose conditions, even under these circumstances, would of necessity be limited to those reasonably adapted to the protection of the public lands; and conditions going beyond this would be unauthorized. Under the broadest possible construction, then, there is nothing in the right of way acts which could support any regulations beyond what would be reasonably necessary to protect the public forest.

The contention, however, is that the authority to make rules and regulations is found in the Forest Reserve Act of June 4, 1897. This act declares the purpose of the reservations to be "to improve and protect the forests, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens."

It authorizes the Secretary to make provisions for the protection of the forest against destruction by fire and depredations, and provides that "he may make such rules and regulations, and establish such service, as will insure the objects of such reservations, namely, *to regulate their occupancy and use and to preserve the forests thereon from destruction.*" The power conferred is thus limited by the express designation of the purposes to be accomplished thereby. It is not a general power, and cannot be exercised to destroy rights conferred by other congressional enactments. Under it, the Secretary cannot legislate, or make any rule or regulation inconsist-

ent with laws enacted by Congress. (*United States* v. *United Verde Co.*, 196 U. S., 207, 214-5.)

The question then is: Do the rules and regulations relied upon destroy rights conferred upon the grantee by the right of way acts, or are they consistent with those acts or the forest reserve legislation?

The rules and regulations referred to by the Government were promulgated February 11, 1904. (This date is erroneously given in the brief as May 11, 1904. (Rec., 8, 176.)) They were amended April 25, 1906 (Rec., 10, 183), so that the provisions stated in the Government's brief, on page 14, were canceled, and in lieu thereof it was provided:

> "Whenever a right of way is located upon a forest or timber land reserve, the applicant must enter into such stipulation, and execute such bond, as the Secretary of Agriculture may require for the protection of such reserve."

Passing without comment the delegation by the Secretary of the Interior to the Secretary of Agriculture of the discretion and authority which Congress had vested in the head of the Interior Department, we note that this regulation assumes that the acquisition of a right of way in forest reserves is dependent upon the consent of executive officers, rather than upon the statutes of Congress; and further assumes the existence of a power in such officers to impose conditions upon the exercise of the rights which the right of way acts had conferred. Clearly, if the acts of Congress had vested title in the grantee, with the right of locating the right of way by construction without filing a map, these assumptions of power were in violation of those acts; and unwarrantably deprived the grantee of rights which Congress had ordained that it should have.

Assuming, however, for the purposes of the argument, that the right of way through the forest reserve could be secured only by the acceptance and approval of a map of location, the stipulation required would be, from the nature of the power to regulate conferred upon the Secretary, confined to those matters which were essential to the protection of the forest. They could not extend to matters which would limit or defeat the grant. The power to regulate could not be extended to a denial of the rights themselves, or to a substitution for the privileges granted by the statute, of different privileges prescribed and designated by the executive officers. An examination of the stipulation demanded, and of that required by the decree, shows, however, that this is precisely what is attempted in this case. The grant was of a right of way to be compensated for only by the construction and operation of the railway. "It was not a mere bounty for the benefit of the railroads but was legislation intended to promote the interests of the Government, and in enhancing the value of those public lands through or near which such railroads might be constructed." (*U. S.* v. *D. & R. G. Ry. Co.*, 150 U. S., 1, 8, 14; *U. S.* v. *M. & S. W. R. Co.*, 176 Fed., 762, 768, 769.)

The stipulation embraced, as one of its principal items, an obligation to pay for timber on the right of way granted and for that cut off the right of way pursuant to the requirements of the forester. Three things are noticeable in this provision: (1) It undertakes, in violation of the legislative will expressed in the right of way acts, to limit the grant by excluding the timber standing on the soil granted; (2) it contemplates a sale of the timber to the Railway Company in violation of the Forest Reserve Act of 1897, prohibiting such sales; and (3) it is not a measure in any way designed for the protection of

the forest. It was, therefore, beyond the power of the executive officers to demand.

The only decisions cited by counsel to sustain the authority of the Secretary are the forest reserve cases (*United States* v. *Grimaud,* 220 U. S., 506; *Light* v. *United States,* 220 U. S., 523). These cases involved grazing privileges within forest reserves, and arose under the Act of June 4, 1897, and supplemental legislation relating to the occupancy of forest reserves and the establishment of rules and regulations relating thereto. The court held that the effect of these provisions was to take away, or revoke, the license theretofore recognized of grazing cattle within forest reserves (133 U. S., 236), and to vest in the Secretary authority to grant permits for grazing upon such conditions as he should impose under rules and regulations adopted under the authority of those acts. The principal question involved was whether the penal provisions of such regulations were unconstitutional as vesting legislative power in the Secretary, and it was held in this regard that the regulations were simply in aid of the provisions of the acts. That question, of course, does not arise here. The only regulation sustained in the forest reserve cases, which by any possibility could be urged here, was the one with respect to the making of a charge for grazing privileges. Bearing in mind the holding of the court that the effect of these acts was to take away the license of grazing, and to make the same unlawful without the consent of the Secretary; that there was no act granting the right to graze; that such privilege was entirely dependent upon the permission of the Secretary under such conditions as he might impose; and that the forest reserve acts expressly recognized the right of the Secretary to impose fees "to prevent excessive grazing, and thereby protect the young growth and native grasses from destruction, and to make

a slight income with which to meet the expenses of management," the decision sustaining the right to charge is not an authority for the Secretary to impose payment for timber cut upon the right of way and extra widths, where it is conceded that a grant of right of way exists under the Act of 1875, provided only the Railway Company executes such stipulation as the Secretary "may require for the protection of the reserve." The asserted authority on the part of the Secretary to require the Company to pay for the timber cut upon the right of way and extra widths would, by the same reasoning, sustain a charge per acre for the land itself included within the right of way, notwithstanding the free grant thereof in fee simple for railroad purposes under the Act of 1875. (*R. G. W. R. Co.* v. *Stringham,* 239 U. S., 44.)

Undoubtedly, the provisions sought to be imposed by the stipulation (Rec., 171), in respect to clearing of the right of way, disposal of the brush and refuse, the falling of trees and the piling of wood, in Clause 1, the observance of reasonable precautions against fire and the furnishing of assistance to put out fires adjacent to the right of way, in Clause 5, are reasonably calculated "for the protection of such reserve," but the requirement to pay for all timber cut within the right of way and the additional strips in Clause 2, which timber was required to be cut upon the right of way, to some extent at least, in order to permit the Railway Company to construct its railroad, and by the direction of the Forest Service upon the entire right of way and the additional widths, merely for affording a protection against fire to the remaining timber within the forest, had no tendency "to preserve the forests thereon from destruction," as provided in the Act of June 4, 1897, or "for the protection of such reserve," within the meaning of the regulation of April 25, 1906.

Point V.

THE CHARGE THAT THE APPELLANT WAS GUILTY OF BAD FAITH IS UNWARRANTED.

In Point IV of the Government's brief, it is charged that appellant "evaded" the execution of the demanded stipulation, that by "a sham agreement and a succession of shallow pretensions," it gained the forbearance of officers of the Forest Service and thereby succeeded in securing the construction of its road without interference by the Government. This charge, which is fully confuted by the record, cannot be passed without objection. Mr. Peck had, as fully shown in the opening brief (see pp. 8-9) signed the writing of May 10, 1907, under a mistake of fact. This writing was not, however, accepted as sufficient to bind the Company. The acceptance noted therein was:

> "Approved and advance permission given to construct, *subject to ratification hereof by the Company.*" (Rec., 37.)

It was never ratified. It appears from the record (pp. 369-379) that the execution of this writing was first brought to the notice of the Company in October, 1907. Mr. Peck was at once advised as to the mistake of fact under which he had acted; and he and Mr. Field immediately notified the officers of the Government, that the paper had been executed under such mistake, and that the Company should not be held thereto. (Rec., 368-384.) November 15, 1907, the Forest Supervisor was notified that the Company would not sign the stipulation. (Rec., 225.)

On December 2, 1907, Mr. Peck notified the forester of the Department of Agriculture at Washington, in writing, that he was not authorized to make any stipulation

with respect to this right of way different from that which had been made for the right of way by the Washington corporation through the Yakima National Forest. (Rec., 225.) It thus appears that the Railway Company immediately upon receiving notice of the existence of the Peck writing, notified the Government that it would not execute the demanded stipulation, and, inferentially, that it would not ratify Mr. Peck's act. There was no concealment of any fact, nor any misunderstanding upon the part of the officers of the Government. This is clearly shown by the memorandum of Mr. Wells, Law Officer of the Forest Service, made December 2, 1907. (Rec., 226, 237.) That memorandum contained the opinion of Mr. Wells upon the legal questions involved, and certainly recognized that they were disputed and doubtful. It also stated that the Company desired a compromise similar to that in the Wenatchee forest, in Washington. Sufficient appears in the record to show that in the case of that forest, where the conditions were similar, the Department did not require payment for the timber. (Rec., 207, 383; testimony of Wells, Rec., 438-440.) After declining to execute the stipulation, like that for the Helena forest, the appellant, through Mr. Field and Mr. Peck, negotiated for a compromise for the right of way, without payment of the timber, along the lines of that consummated in the case of the Wenatchee forest, in Washington. Counsel speak of these negotiations as sham and shallow. They were not so considered by Mr. Wells in his memorandum of December 2, 1907, which stated that the Service would either compromise upon terms to be agreed to hereafter, or submit the case to the courts. That negotiations were carried on in good faith is recognized in the letter of Mr. Wells to Mr. Peck as late as April 27, 1908 (Rec., 237), and he then indicated that he would prepare a draft of a bill

for the purposes of a suit. It is to be noted here that the draft was prepared and submitted to Mr. Field, in July, 1908. (Rec., 239-242.) In the meantime, the Department *revised the stipulation* that it was demanding, and the new stipulation was submitted under date of July 10, 1908. (Rec., 241.) During this time, the work of construction of the railway was proceeding with the full knowledge and acquiescence of the Government, although it was fully advised as to the contention of the Railway Company that it could not legally be required to sign the demanded stipulation, and that it would not do so. The bill of complaint was not filed until July 23, 1909, twenty months after the Department had been notified that the Company refused to sign the stipulation, and only after the practical completion of the road. These undisputed facts establish that the charge of bad faith upon the part of the Company is utterly without foundation.

The other propositions discussed by counsel for appellee are fully met in our opening brief.

H. H. Field,
F. M. Dudley,
Appellant's Counsel.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY OF IDAHO *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 176. Argued April 18, 19, 1917.—Decided June 4, 1917.

The power to establish forest reservations, bestowed upon the President by acts of Congress, includes the power to withdraw lands temporarily from disposition under the public land laws in order that they may be examined, and, if found suitable, may be permanently reserved as forests.

An act of the Secretary of the Interior in directing the making of a temporary withdrawal for forest reserve purposes is in legal contemplation the act of the President.

Lands reserved for forest purposes, whether by temporary withdrawal or permanent reservation, are "specially reserved from sale" within the meaning of § 5 of the general railroad right of way act of March 3, 1875, c. 152, 18 Stat. 482, and also, like the military, park and Indian reservations therein mentioned, are set apart for a public purpose, and are not subject to the provisions of that act.

Under the provision relating to the subject in the Act of March 3, 1899, c. 427, 30 Stat. 1233, a railroad right of way may be obtained over a temporary or permanent forest reservation only if in the judgment of the Secretary of the Interior the public interests will not be injuriously affected thereby, and, in exercising his broad discretion under this provision, the Secretary may condition his approval of an application upon the prior filing of a stipulation, binding upon the applicant, respecting the use and enjoyment of the privilege granted, the prevention of forest fires, and compensation for timber cut or destroyed or for other injuries done to the reservation.

Where, for the purpose of securing a right of way under the Act of 1899, *supra*, with immediate permission to proceed with construction work, a railroad company's agent agreed in writing that it would later execute and abide by a stipulation touching its rights and conduct in the reservation, but the agreement was made subject to ratification by the company, *Held*, that the company's action in availing itself of the permission and proceeding with the construction work with knowledge of the manner in which the permission

had been obtained, and its acceptance of ensuing benefits, amounted to an implied ratification of its agent's agreement, binding the company either to execute the required stipulation or to discontinue the construction and operation of its railroad within the reservation.

A suit by the United States to enjoin a railroad company from constructing and operating its road through a national forest in default of the execution and filing by it of a stipulation required by the Secretary of the Interior, and to obtain damages for timber cut and destroyed and for injury done in the course of the construction and operation of such railroad, is cognizable in equity, and a bill praying such relief is not multifarious.

The damages assessed against the appellant in this case are in part justified by the terms of the stipulation which it agreed to execute, and in other respects are sustained by the concurring decisions of the courts below.

In the absence of either cross-appeal by the Government or objection by the appellant company, the court will not decide whether the decree, instead of commanding unconditionally that the company execute the stipulation agreed upon, should not have provided, in the alternative, for ousting the company from the reservation if it did not execute such stipulation within a certain time.

218 Fed. Rep. 288, affirmed.

THE case is stated in the opinion.

Mr. F. M. Dudley and *Mr. H. H. Field* for appellant.

Mr. Assistant Attorney General Kearful, with whom *Mr. W. W. Dyar* was on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the United States to enjoin a railroad company from constructing or operating its railroad through a national forest reserve in Idaho unless it executes and files with the Secretary of the Interior a stipulation required by that officer, and to obtain damages for timber cut and destroyed and injury done in the course

of the construction and operation of such railroad. In the District Court, 207 Fed. Rep. 164, and in the Circuit Court of Appeals, 218 Fed. Rep. 288, the Government prevailed. The railroad company prosecutes this appeal.

The forest reserve had its inception in an order by the Commissioner of the General Land Office, made March 21, 1905, temporarily withdrawing a large body of public lands from all disposal, save under the mineral land laws. The order was made by direction of the Secretary of the Interior with a view to the creation of a permanent forest reserve, under § 24 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, if after further examination that should receive the President's approval. The permanent reserve was created November 6, 1906, by a proclamation of the President. Between the temporary withdrawal and the President's proclamation the railroad company was incorporated under the laws of Idaho and filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization. During the same period it also filed in the local land office a map or profile of its proposed railroad through the reserve, and after the President's proclamation it filed in that office a second and then a third map. The line of the proposed road shown upon the second map differed widely from that upon the first and the line shown upon the third differed materially from those upon the others. The first and second maps, neither of which had been approved, were returned to the company as superseded by the third. It was filed May 10, 1907. At that time, as also before any map was filed, the regulations governing applications for railroad rights of way in forest reserves required the applicant to enter into a stipulation respecting the use and enjoyment of the privilege, the prevention of forest fires, the compensation to be made for timber cut or destroyed and the duty of the company to pay for any injury otherwise done to the reserve. 32 L. D. 481; 34

L. D. 583. One provision in the regulations said: "No construction can be allowed on a reservation until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved by the Department, or has been considered by this office or the Department, and permission for such construction has been specifically given." After filing the third map the company sought permission from the Forest Office to proceed with the construction of its railroad in advance of the approval of its map, and to that end its authorized representative, Mr. George R. Peck, in its behalf, signed and filed in the Forest Office the following memorandum:

"Whereas, the Chicago, Milwaukee & St. Paul Railway Company of Idaho desires immediate permission from the Forest Service to begin construction of the company's railroad in the Coeur d'Alene National Forest, Idaho, I hereby promise and agree on behalf of the company that it will execute and abide by stipulations and conditions to be prescribed by the Forester in respect to said railroad; such stipulation and conditions to be as nearly as practicable like those executed by the company on January 18, 1907, in respect to its railroad within the Helena National Forest, Montana."

The Forester wrote upon the memorandum, and signed, an endorsement, saying: "Approved and advance permission given to construct, subject to ratification hereof by the company." At the same time a telegram was sent to the supervisor of the reserve, saying: "Advance permission given today St. Paul Railroad Company to construct railroad through Coeur d'Alene, subject usual stipulations. Supervise clearing and piling and scale all timber cut."

There was no express ratification of the Peck memorandum, but shortly after it was made the company entered upon the reserve and actively proceeded with the construction of its road, which it would not have been per-

mitted to do without the memorandum. Not until the work had proceeded for some months was there any indication that the memorandum was not satisfactory to the company. It then declined to execute the stipulation called for by the memorandum and assigned as a reason that Mr. Peck had acted upon the mistaken belief that the President's proclamation creating the permanent reserve preceded the filing of the first map, when in fact the map was filed before the proclamation was issued, and that the execution of such a stipulation as was called for by the memorandum was indispensable, when, as the company asserted, it was entitled, under the Act of March 3, 1875, *infra*, to a right of way through the reserve without entering into any stipulation or assenting to any conditions. But the officers of the Forest Service insisted, with the full sanction of the Secretary of the Interior and of the Secretary of Agriculture, that the stipulation be executed and that without it the company was not entitled to proceed. This resulted in a conference at which the company particularly requested that its construction work be not disturbed and assented to an arrangement for further negotiations or, if need be, a "friendly lawsuit." Further negotiations failed and the present suit followed. When it was begun the road through the reserve was nearly completed and was in operation, the construction being on the line shown on the third map. Approval had not been given to this map but had been withheld awaiting the company's execution of the prescribed stipulation.

The District Court, after concluding and announcing that the company was bound by the Peck memorandum and that the Government was entitled to a decree, gave the parties an opportunity to agree upon the form of stipulation called for by that memorandum and then postponed the assessment of damages as a matter which might be affected materially by the terms of the stipula-

tion. Afterward the parties brought into court a form of stipulation, which they agreed was what was required by the Peck memorandum, and that form was adopted by the court, with the addition only of a paragraph declaring that the stipulation should be deemed to have been executed as of May 10, 1907, which was the date of the Peck memorandum, of the permission to proceed with the construction and of the filing of the map according to which the road was constructed.

Rights of way for railroads over lands of the United States were granted only by special acts until March 3, 1875, when Congress enacted a general law upon the subject and confided its administration to the Land Department. Chap. 152, 18 Stat. 482. But that law, by its fifth section, was declared to be inapplicable to "any military, park, or Indian reservation, or other lands specially reserved from sale." Lands in a forest reserve not only are specially reserved from sale, but, like those in the reservations particularly named, are set apart for a public purpose. Act June 4, 1897, c. 2, 30 Stat. 34–36. That they come within the excepting provision of the fifth section, as do lands in other public reservations, is plain. Both Congress and the Land Department have so regarded them. House Report No. 1212, 54th Cong., 1st sess.; House Report No. 1790, 55th Cong., 3rd sess.; *Brainard and Northern Minnesota Ry. Co.*, 29 L. D. 257. Thus the company neither did nor could acquire a right of way over these lands under the law of 1875. And this is true notwithstanding the preliminary steps taken, as before recited, in advance of the creation of the permanent reserve. The temporary withdrawal was made several months before any of those steps were taken—indeed, before the company came into existence—and remained in force until the permanent reserve was created. While the withdrawal was in force it was as much of an obstacle to the acquisition of a railroad right of way over

these lands as was the permanent reserve thereafter. The power to establish the reserve included the power to make the temporary withdrawal, and the act of the Secretary of the Interior in directing the latter was in legal contemplation the act of the President. *United States* v. *Morrison*, 240 U. S. 192, 212; *Wilcox* v. *Jackson*, 13 Pet. 498, 512–513; *Wolsey* v. *Chapman*, 101 U. S. 755, 769–770.

We come then to the provision in the Appropriation Act of March 3, 1899, c. 427, 30 Stat. 1233, which says:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

Doubtless if this provision were separately considered, its purpose would seem obscure, but it must be considered in connection with the law of 1875 and the rulings thereunder, and when this is done its purpose seems reasonably plain. That law, by its first section, provides in general terms for rights of way for railroads over public lands. By its fourth section it deals with the identification of the desired right of way by a survey and plat and provides for filing the plat and securing its approval by the Secretary of the Interior. By its fifth section, as has been seen, it excepts forest and other reservations from its operation. Because of this exception the Secretary of the Interior was ruling—properly so, as we think—that his authority did not extend to receiving and approving surveys and plats of rights of way in forest reserves. And so, to obtain such a right of way it was necessary to go to Congress. The requests for special acts came to be frequent, especially as the reserves were increasing in number. In this situation Congress passed the provision last quoted. It is a general and continuing provision, and says, in substance, that rights of way for railroads

through forest reserves may be secured when, and only when, the public interests will not be injuriously affected, and it commits the solution of that question to the Secretary of the Interior. If "in his judgment" the public interests will not be jeopardized, he "may file and approve" surveys and plats of any such right of way. In short, he is invested with a large measure of discretion to be exercised for the conservation of the public interests, and only through his approval can the right of way be acquired without further action by Congress.

Here the Secretary made it manifest, through the regulations before noticed and otherwise, that in his judgment due regard for the public interests required that a stipulation, such as was described in the Peck memorandum, be exacted of the company as a condition to the approval of the survey and map, that is, to securing the right of way. Rightly understanding that this was so, Mr. Peck, the company's representative, promised on its behalf that it would comply with that condition. The promise was given for the purpose of securing permission to proceed at once with the construction of the road, and on the faith of the promise the permission was given. While this was said to be subject to the company's ratification, it must be held upon this record that there was an implied ratification. The company promptly availed itself of the permission and proceeded with the work of construction. The circumstances were such that it must have known how the permission was obtained. It was largely benefited thereby and to these benefits it ever since has held fast. True, after some months had elapsed, it manifested a purpose to disaffirm Mr. Peck's promise, but that was after the implied ratification and after the construction had proceeded so far that restoration of the original situation was not possible.

It follows that the company not only is bound by the Peck memorandum but is in a position where it must

execute the required stipulation or discontinue the construction and operation of its railroad in the reserve.

It is objected that the case is not one which is cognizable in a court of equity and that the bill is multifarious. Both branches of the objection are without merit, so plainly so that a discussion of them would serve no purpose.

The assessment of the damages is called in question, but without any good reason. The stipulation agreed upon as conforming to the Peck memorandum was rightly regarded as decisive of several of the questions bearing upon the assessment and no reason is perceived for disturbing the concurring decisions below upon the others.

The decree unconditionally commands the execution and filing of the prescribed stipulation without awarding an alternative injunction, and counsel for the Government suggest that it should have enjoined the company from the further occupation of the reserve unless within a prescribed time the stipulation be executed and filed. The criticism is not without merit and doubtless is prompted by a careful study of the bill. But as the Government has not appealed and the company is not complaining of the failure to put the matter in the alternative, the point may be passed without further notice.

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.